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IN THE

Supreme Court of the United States

October Term, 1970.

No. 1654

RALPH GINZBURG,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

HAROLD E. KOHN,
LOUIS E. LEVINTHAL,
ARTHUR M. KAPLAN,
2600 The Fidelity Building,
Philadelphia, Pa. 19109
Attorneys for Petitioner,
Ralph Ginzburg.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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Ralph Ginzburg hereby petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on February 2, 1971, rehearing denied March 30, 1971, in *United States of America v. Ralph Ginzburg, et al.*, Docket No. 19,090.

I.

OPINIONS BELOW.

The opinion of the United States District Court at trial is reported at 224 F. Supp. 129 (E. D. Pa., 1963) and is included in the printed appendix hereto at A1. The opinion of the United States Court of Appeals, affirming the con-

viction, is reported at 338 F. 2d 12 (3rd Cir. 1964) and is included in the printed appendix hereto at A17. This Court granted certiorari at 380 U. S. 961, 14 L. ed. 2d 152, 85 S. Ct. 1103 (1965), that order being appended hereto at A27. The opinion of this Court affirming conviction appears at 383 U. S. 463, 16 L. ed. 2d 31, 86 S. Ct. 942 (1966) and that denying rehearing at 384 U. S. 934, 16 L. ed. 2d 536, 86 S. Ct. 1440 (1966) are appended at A27 and A66, respectively.

Also appended hereto, at A66, is the Judgment and Commitment of Ralph Ginzburg, including denial of his Petition for Reconsideration of Sentence, which are unreported. The Court of Appeals reversed the denial of the Petition for Reconsideration and remanded the sentencing issue to the District Court in an en banc decision reported at 398 F. 2d 52, appended hereto at A67. The District Court then modified the sentence, in an unreported order attached hereto at A92 and the Court of Appeals affirmed the decision of the District Court and denied a petition for rehearing. The last two actions of the Court of Appeals are, as yet, unreported and are appended hereto at A94 and A95, respectively, along with Judge Freedman's proposed dissent appended hereto at A96.

II.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 2, 1971, and rehearing denied on March 30, 1971. The United States District Court for the Eastern District of Pennsylvania by its Order of March 19, 1971, appended hereto at p. A99, granted a stay of judgment pending the filing of a petition of certiorari prior to May 3, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

III.

STATEMENT OF QUESTIONS PRESENTED.

1. Should a sentence be upheld upon appeal, where it appears that the District Court Judge acted upon a mistaken belief as to the term of the maximum sentence possible, and a mistaken belief as to the leniency of the sentence when compared to the erroneously computed maximum term?

2. Does sentencing based upon the erroneous presumption that in mass publication a separate three-year sentence, as here, may be given for each mailing of each copy of the publication, violate the constitutional prohibition upon cruel and unusual punishment and constitute improper construction of 18 U. S. C. § 1461?

3. Should a five-year sentence have been sustained in the face of the decisive and uncontroverted evidence in the hearing on sentencing as to Petitioner Ginzburg's lack of knowledge of the attempt to secure postal registration at salaciously suggestive addresses, and the emphasis laid upon this point in the Supreme Court's prior opinion on the issue of criminal liability?

4. Should a five-year sentence have been sustained despite the clear evidence in the hearing on sentencing of hardship and good character of the petitioner and his efforts to observe the letter of the law in publication?

5. Should the attempt to publish a reasonably serious and comparatively restrained journal be punished by a five-year sentence when completely and blatantly prurient material is freely and amply available in stores and theaters throughout the country?

6. Did the District Court err in fining petitioner a total of $10,000 on counts based solely upon the mailing of advertising (Counts 1 through 10) despite the Supreme Court's finding that advertisements and inquiries concerning mailing addresses were relevant to the issue of liability for mailing the main publications, rather than as a source for independent liability (383 U. S. at 470, 474)?

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provisions involved are the First Amendment and Eighth Amendment to the U. S. Constitution:

Amendment I: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The statutory provision involved, 18 U. S. C. § 1461, is appended at p. A100.

V.

STATEMENT OF THE CASE.

The 3rd Circuit Court of Appeals in 398 F. 2d 52, remanded Mr. Ginzburg's case for a rehearing on sentencing. The opinion of Judge Kalodner, in which Chief Judge Hastie concurred read as follows:

> "[S]hould Ginzburg's testimony at a hearing on his petition establish that he did not participate in the aura producing techniques condemned by the Supreme Court, viz., the mail privilege solicitations at Intercourse, Pennsylvania, Blue Ball, Pennsylvania, and Middlesex, New Jersey, and the good character and hardship aspects of his petition . . . it would warrant a *significant change* by the District Court in the *nature and character of its present sentence.*" 398 F. 2d 52, at 56. (Emphasis supplied.)

A concurring opinion was filed by Judge Seitz, concurred in by Judge Freedman. Chief Judge Hastie added that he ". . . also agrees that the concurring opinion states adequate reasons for vacating the Appellant's sentence." (398 F. 2d 52 at 57). In that concurring opinion it was stated:

> "At the argument on this petition the district court . . . stated that Ginzburg had been convicted on 28 counts. It then indicated that it could have sentenced him to 140 years. . . . I believe that the District Court was not legally warranted in assuming that it could have imposed prison sentences aggregating 140 years.
>
> I think the allowable units of prosecution were 6 at most [one for each of the three publications and one for the advertising in connection with each]. See *Ladner v. United States,* 358 U. S. 169, 79 S. Ct. 209, 3 L. ed. 2d 199 (1958). It is true that this would still have

permitted the District Court to impose a substantially greater prison sentence than was in fact imposed. But that is not the point. The point is that when it fixed the 5-year sentence the district court believed it was being lenient in relation to 140 years."

Yet, on remand, Judge Troutman sentenced the Petitioner to six concurrent three-year sentences and six concurrent two-year sentences, to be served *after* the three-year sentences, and placed Petitioner on probation only as to the two-year sentences. In essence, Judge Troutman responded to the broad directive for reconsideration only by placing him on probation as to the last two years of his sentence. An appeal from resentencing was denied. On a rehearing of that appeal Judge Freedman, before his death, prepared a dissenting Opinion expressing what he himself described as a strongly held view that the issue of sentencing should be reheard. In his view, the resentencing had repeated the very same error by fixing an erroneously long maximum permissible sentence, and then granting a 5-year sentence deemed short only by comparison. The district court erred in its construction of the federal statute in giving separate sentences for mailing each copy of a publication. Certainly, five million times five years (twenty five million years) would constitute cruel and unusual punishment for the mailing of 5 million copies of a publication adjudged obscene. Yet the rule of construction used in the district court would produce just such results, should the indictment be so written. Similarly, the erroneous maximum sentence in a petitioner's case was reached by multiplying the maximum sentence for each publication by three, for copies mailed to each of three named individuals.

Judge Freedman in his proposed dissenting opinion, written before his demise, wrote of this issue as follows:

"The concurring opinion [in the Third Circuit's remand for reconsideration of sentence] declared that the sentences should be reconsidered because the sentencing judge had erroneously thought he could have imposed sentences of imprisonment aggregating 140 years, based on the 5-year statutory maximum sentence multiplied by each of the 28 counts. The concurring opinion also pointed out that this error was not cured because the 5-year sentence was within the allowable maximum on any one count. This was because it was obvious that the sentencing judge acted in the mistaken belief that he was being lenient, as indeed would have been the case if his assumption were correct that he could have imposed sentences on each of the 28 counts.

"Under the view expressed in the concurring opinion there could be only one sentence on Counts 11 to 16 and only one sentence on Counts 17 to 22. [Counts 11-16 concern mailing the Housewife's Handbook; Counts 17-22 concerned mailing Eros.] But now sentences have been imposed on all 12 of these Counts. As in the original sentences, they do not exceed the allowable maximum of 5-years imprisonment. The error, however, is that the resentencing judge too was influenced by the fact that he thought sentences could have been imposed for 5 years on each of the 12 Counts, for a total of 60 years imprisonment.

"It is true that the judge ordinarily would be limited in resentencing to the maximum sentence originally imposed. This, however, does not alter the effect on the resentencing judge's mind of the seeming severity of the wrongs committed if he believed that but for the leniency of the original sentence he would have had the power to impose sentences on these 12 Counts, totalling 60 years.

> "In reimbursing fines on all 28 counts, the resentencing judge repeated the original imposition of fines of $1,000 on each Count, for a total fine of $28,000 [that is, $1,000 for each mailing to each person]. Assuming that the resentencing judge was limited to imposition of a fine on each count, which would be no greater in amount than was originally imposed on each count, under the view expressed in the concurring opinion there were at most 6 allowable units of prosecution on which the fines could have been imposed, or a maximum fine of $6,000 [that is $1,000 for each publication or advertisement, rather than for each copy mailed].
>
> "The resentencing, therefore, contains the same basic error which pervaded the original sentencing."

Furthermore, as to Mr. Ginzburg's involvement in inquiries concerning mailing privileges at Intercourse, Pennsylvania, and Blue Ball, Pennsylvania, the record is now completely clear. His innocence in this matter was fully proven, and uncontroverted, in the sentencing hearing. However, the facts of his lack of knowledge and lack of involvement had not been put at issue before the district court in the trial upon criminal liability, 224 F. Supp. 129, because under the Supreme Court's prior rulings inquiries concerning a mailing address appeared irrelevant. The importance attributed to this issue in the Supreme Court's opinion, makes clear that a lack of personal knowledge on Mr. Ginzburg's part of abortive attempts to seek these mailing addresses goes far to negate personal scienter and certainly requires leniency in sentencing. Furthermore, expansive evidence was introduced as to Mr. Ginzburg's excellent personal character and as to the obvious and great hardships he, and those in his family, will undergo while he is in federal prison.

The record establishes the following determinative facts:

1. Defendant Ginzburg had absolutely no part, and *no mens rea*, in the applications for mailing privileges at Intercourse, Pennsylvania, Blue Ball, Pennsylvania, or Middlesex, New Jersey. The uncontroverted testimony of two witnesses, Ginzburg himself and Frank Brady, both subject to cross-examination, established that inquiry to the postmasters at Pennsylvania towns was not made by Mr. Ginzburg but by Mr. Brady, an employee of the corporate defendant (453a, 639a, 641a, 643a, 700a). Ginzburg did not know that the inquiries were being made; he had not been consulted or informed, nor had he directed that they be made. Indeed, when, after the fact, Ginzburg was informed of the inquiries to the Pennsylvania towns, he indicated that applications there would not have been good policy and should not have been made (641a, 642a, 647a, 656a, 700a-01a, 712a). This testimony was not controverted. As for the address finally chosen, Middlesex, New Jersey, it was the location of the General Mailing Corporation, then the largest mailing house in the East, used by, *inter alia*, CBS and Columbia Records, and selected by Mr. Brady as the low bidder to take care of the mailing of defendant corporations' publications and advertising (642a, 657a, 701a). Indeed, neither Mr. Ginzburg nor Mr. Brady conceived of Middlesex, New Jersey, the address of General Mailing Corporation, as a "sexy" name, until the government made the insinuation at trial (453a, 642a, 644a, 702a-04a).

2. Defendant Ginzburg had no intention of placing himself at the outskirts of the law. He had been firmly advised by counsel that the use of the mails for distribution of his publications was lawful. Said advise was given Ginzburg

by David I. Shapiro, Esq., a member of the Bars of New York and Washington, D. C., and of firms in both cities, with 20-years practice in civil liberties matters, including considerable experience with the law of obscenity. The advice pertained specifically to the Housewife's Handbook and the fourth issue of Eros, and was received by Ginzburg before those publications were placed in the mails (600a-04a, 695a-700a). It was Mr. Shapiro's opinion, and he thought it would have been the opinion of all lawyers familiar with the law, that the publications themselves were the sole matter at issue in an obscenity prosecution, and that the publications themselves were not obscene.* The petitioner's attempt to stay well within the law on obscenity, both before and after this case arose, was well documented at the sentencing hearing. His desire, both then and now, to be law abiding, is surely relevant to the issue of sentencing.

3. Defendant Ginzburg is of indisputably good character. The uncontroverted testimony of 6 witnesses—Ginzburg's former counsel on other matters, now Judge Irving Younger, his former teacher, Irving Rosenthal, Sloan Wilson, the distinguished author of rather conservative views, David Bar-Illan, an accomplished and cultured concert pianist, defendant's wife, Soshana, and defendant himself—eloquently establishes the fact. As one reads through the testimony of his sentencing hearing, it is clear that, far from being a dangerous or debased criminal, he is a person of exemplary and extraordinary character.

Ginzburg is also a first offender; he has never been previously arrested or charged with a criminal offense of any kind whatsoever. He is a law abiding, hard-working mem-

* It would have been the opinion of the undersigned counsel, had they have been consulted. It was also clearly the opinion of Justices Harlan, Stewart, Black and Douglas.

ber of the community. He worked hard to secure and pay for his own education, helping to support his immigrant family along the way. He has held many responsible positions with leading and respected publications and a major television network (679a-82a, 700a). He is "a model family man"; as Judge Younger testified, "He acts in the way I hope to act as a husband and father." (464a-69a). "Mr. Ginzburg is a man sensitive to social and moral family considerations and anxious to do what is right in connection with those matters." (577a, 666a, 670a-74a, 691a-95a).

4. Petitioner's publishing endeavors have unquestionably redounded in the main to the benefit of the community. As publisher and editor, he brought to the attention of the nation the automobile safety question, and started Ralph Nader on his way (686a-87a). He printed Sloan Wilson's criticism of our Vietnam policy when no other publication would do so (704a). He has printed valuable commentary on other important public questions, and much prized work for the benefit of the public; he has helped many other worthwhile writers. It is no minor matter, for Mr. Ginzburg or for the nation, for Mr. Ginzburg to be placed in a federal prison for three years.

5. Mr. Ginzburg's sentence will cause terrible hardships to him and his family. Since shortly after her father's conviction, Ginsburg's daughter, Bonnie, whose mother developed a latent psychosis during confinement and committed suicide when she was less than a year old, has suffered from serious psychoneurosis (674a-77a, 692a). The separation of petitioner from his daughter will seriously damage that child's mental health, impairing her chances of recovery (677a-78a). In addition to his wife and three children, defendant's widowed mother and his blind sister depend upon him for financial support, as well as comfort and guidance (690a-91a).

6. Finally, as the testimony of Judge Younger makes clear, defendant Ginzburg has shown an unalterable desire to avoid publishing any matter which might possibly offend the obscenity laws and to lead a life free of any criminal conduct (729a-30a,.573a-74a, 576a-77a, 718a-19a).

It should be noted in closing that there are most important First Amendment implications in Mr. Ginzburg's sentencing. For we must ask, what will happen to the defendant who steps over that very hazy, and changing, line which separates the constitutionally protected from statutorily prohibited. Will the editor or publisher who treads near the outer limits of political or cultural constitutionally protected free speech, be told that he treads at more than reasonable risk; that if he steps across the line he will be sentenced out of proportion to the foreseeable illegality in his acts; that he will be sentenced without regard to his past or future attempts to stay within the clear bounds of constitutionally sanctioned speech; that the court will disregard a clear showing of lack of responsibility for those elements deemed most salient in the decision upon criminal liability; that he will be sentenced in disregard of the constructive aspects of his publishing and personal life? If this is so, as it is in the sentencing of Petitioner Ginzburg, a chilling effect will surely be placed upon the use of protected First Amendment rights. In this landmark constitutional case, the Court clearly has a responsibility to make certain that the punishment only "fits the crime."

Even at the time of the original sentence, the publications involved were mild in comparison with what was being circulated generally, and the old Comstock Law,* under which he was sentenced, had to be "reinterpreted" to sustain his conviction. Today, with full or more explicit acts

* The same law, which prohibits dissemination of birth control material, and is violated daily in this respect, by every level of government.

of sexual relations being portrayed daily by live actors on the stage, and in motion pictures and pictorial magazines, it is indeed cruel and unusual punishment to send this man, under the nature and circumstances of his publications, to prison under a 3-year sentence, particularly in a First Amendment context.

Such a sentence in this case endangers the First Amendment and is plainly wrong from any point of view. As Judge Younger, a man of impeccable training and experience (564a-68a), testified on the witness stand (581a-82a):

> "I have said before, and now say that I am proud to be a lawyer, have enormous faith in the profession, but in this case, and so far as I know, it is the only case about which I would say, if Mr. Ginzburg, if this defendant goes to prison—I don't speak about the fine or any other possible mode of punishment—I think that I for the first time in my career would be ashamed of the profession.
>
> "In this case, and so far as I can tell, this is the only case of which I can say this, I just cannot conceive of any rational purpose that would be served in sending this defendant to prison."

VI.

REASONS FOR GRANTING THE WRIT.

1. Sentencing and resentencing based upon an erroneous conclusion as to the maximum sentence available presents an important question in the administration of the federal criminal laws and the federal courts. An erroneous interpretation of the law as to the number of counts, where sentences for each count are to run consecutively, constitutes reversible error. *Ladner v. United States,* 358 U. S. 169 (1958). Where sentences are caused to run concurrently, as is often the case, but the term and severity of the concurrent sentence are determined in comparison to the highest consecutive maximum sentence available, it is similar reversible error to erroneously compute the number of separate counts for which a defendant may be sentenced. *See Yates v. United States,* 355 U. S. 66, 75, 76 (1957).

2. Because interpretation of the federal obscenity statute, 18 U. S. C. § 1461, is of great importance in terms of the rights of free speech and of the press, a question of construction in computing counts and sentences that can, and has in this case, resulted in a gross enlargement of the maximum sentence allowable—the sentence against which leniency is judged—should be heard by this Court. Similarly, the formulation of a maximum sentence below clearly constitutes cruel and unusual punishment in its potential for maximum sentences far greater than life for the mailing of numerous copies of a single publication. The statute should be interpreted as to sentencing so as to resolve, rather than add to, any doubt as to its constitutionality. This Court should consider an issue so serious as to chill mass publication, by thoughtful persons, of protected speech.

3. The Supreme Court retains special responsibility as to later proceedings in cases in which it has granted certiorari and handed down its decree. 28 U. S. C. A. § 1254, Notes of Decision 74 ("Successive Writs").

4. The decision of the Supreme Court in reference to Mr. Ginzburg and the defendant corporations laid special emphasis upon inquiries into mailing addresses at Intercourse, Pa. and Blue Ball, Pa. These issues had not been fully litigated in the trial upon criminal liability, because of their seeming irrelevance under then existing law to the experienced and respected counsel that Mr. Ginzburg retained at that time. However, clear and uncontroverted evidence was introduced as to this question, as it pertains to Mr. Ginzburg's sentencing. Defendant Ginzburg had no knowledge of the inquiries at the time they were made, and disapproved of them afterwards. The District Court's disregard for this factor in the Supreme Court's Opinion, in Mr. Ginzburg's sentencing and resentencing, warrants review by this Court in order to effectuate the logic of its Opinion.

5. Ralph Ginzburg, as a consequence of his major achievements in the field of publishing as well as the decision of this Court affecting him, is a national figure. A sentence to several years imprisonment, out of all proportion to any wrongdoing and in disregard of his character and his many achievements, and in disregard of the new and timely showing of facts bearing upon the mailing address issue found so important by this Court, would genuinely shock the public conscience.

6. The Ginzburg case has been litigated in the gray areas of First Amendment rights. Just as substantive law in this area has generally been interpreted in order to avoid a "chilling" effect upon the utilization of rights

of speech and press, sentencing, too, at the border line should not be out of proportion to the offense committed and the character of the actor. For in this changing and uncertain area, *disproportionate* penalties will as surely breed overbroad caution and self-censorship, as would an ambiguous interpretation of the lines of liability.

VII.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

HAROLD E. KOHN,
LOUIS E. LEVINTHAL,
ARTHUR M. KAPLAN,
Attorneys for Petitioner,
Ralph Ginzburg.

Appendix.

UNITED STATES of America

v.

Ralph GINZBURG, Documentary Books, Inc., Eros Magazine, Inc., Liaison News Letter, Inc.

Crim. A. No. 21367.

United States District Court

E. D. Pennsylvania.

Nov. 21, 1963.

Drew J. T. O'Keefe, U. S. Atty., J. Shane Creamer, Isaac S. Garb, Asst. U. S. Attys., Philadelphia, Pa. for plaintiff.

Norman A. Oshtry, Philadelphia, Pa., David I. Shapiro, and Sidney Dickstein, Washington, D. C., for defendants.

Murry Powlen, Philadelphia, Pa., for American Civil Liberties Union, Amicus Curiae.

BODY, District Judge.

The following Special Findings of Fact which were previously entered by the Court on August 6, 1963 are hereby incorporated into and made a part of this opinion:

SPECIAL FINDINGS OF FACT.

1. The stipulation entered into by counsel for defendants and counsel for the government, and approved by this Court, dated May 8, 1963, filed the same day (Clerk's File, Document Number 12) is hereby incorporated in its entirety as a finding of this Court.

2. The mailing of "Liaison" Vol. 1, No. 1, 1962; "Eros" Vol. 1, No. 4, 1962; and "The Housewife's Handbook on Selective Promiscuity" (referred to hereinafter as "Liaison", "Eros" and "The Handbook" respectively) was accomplished by large quantity distribution through a large mail order firm.

3. Defendants sought initially to obtain mailing from Blue Ball, Pennsylvania; secondly, from Intercourse, Pennsylvania; and finally succeeded in making arrangements for mailing from Middlesex, New Jersey, from which place all or substantially all of the mailings issued.

4. The particular places referred to in Finding No. 3 were chosen in order that the postmarks on mailed material would further defendants' general scheme and purpose.

5. The Handbook is a vivid, explicit and detailed account of a woman's sexual experiences from age three years to age thirty-six years which goes substantially beyond customary limits of candor exceeding contemporary community standards in description and representation of the matters described therein.

6. The Handbook appeals predominantly, taken as a whole, to prurient interest of the average adult reader in a shameful and morbid manner.

7. The Handbook is patently offensive on its face.

8. The Handbook treats sex in an unrealistic, exaggerated, bizarre, perverse, morbid and repetitious manner and creates a sense of shock, disgust and shame in the average adult reader.

9. The Handbook has not the slightest redeeming social, artistic or literary importance or value.

10. There is no credible evidence that The Handbook has the slightest valid scientific importance for treatment of

individuals in clinical psychiatry, psychology, or any field of medicine.

11. Liaison consists primarily of matters relating to sex and in doing so it goes beyond customary limits of candor, exceeding contemporary standards in description and representation of the matters described therein.

12. Liaison primarily and as a whole is a shameful and morbid exploitation of sex published for the purpose of appealing to the prurient interest of the average individual.

13. Liaison has not the slightest redeeming social, artistic or literary importance or value.

14. Liaison is patently offensive on its face.

15. Liaison treats sex in an unrealistic, exaggerated, bizarre, perverse, morbid and repetitious manner and creates a sense of shock, disgust and shame in the average adult reader.

16. While portions of Eros are taken from other works and may have literary merit in context, Eros appeals predominantly, taken as a whole, to prurient interest of the average adult reader in a shameful and morbid manner.

17. The deliberate and studied arrangement of Eros is editorialized for the purpose of appealing predominantly to prurient interest and to insulate through the inclusion of non-offensive material.

18. Eros treats sex in an unrealistic, exaggerated, bizarre, perverse, morbid and repetitious manner and creates a sense of shock, disgust and shame in the average adult reader.

19. Eros has not the slightest redeeming social, artistic or literary importance or value taken as a whole.

DISCUSSION.

On March 15, 1963 the Grand Jury in the Eastern District of Pennsylvania returned a 28 count indictment charging defendants with mailing obscene publications and advertisements for those publications in violation of 18 U. S. C. § 1461. Defendants filed a motion to dismiss various counts of the indictment under Rule 12 of the Federal Rules of Criminal Procedure. Subsequent thereto, the Government filed a motion to strike the affidavit and exhibits appended to defendants' motion to dismiss the indictment. Oral argument was heard on both of these motions on May 17, 1963, and on that day the Court granted the Government's motion. On May 23, 1963 the Court denied defendants' motion to dismiss the indictment. From June 10 to June 14, 1963 the case was tried before the Court without a jury, and all defendants were found guilty on all counts. Defendants have filed a Motion in Arrest of Judgment, or, in the alternative for a New Trial, which motion is now before the Court.

A stipulation of counsel has been filed and approved by the Court. In this document the United States agrees that the advertising material (attached as exhibits to the stipulation) is not in and of itself obscene. In return, defendants admitted that said advertising material was mailed by defendants on the occasions alleged in the indictments with full knowledge of the nature of the contents thereof. In addition, counsel agreed that the alleged non-mailable materials, Liaison, Eros and The Handbook, were to be considered a part of the indictments as though fully set forth at length therein. Oral argument on the motions was waived by counsel. These motions are: a motion in arrest of judgment and, in the alternative, a motion for a new trial. In support of both motions defendants raise four issues.

ALLEGED FAILURE OF THE COURT TO COMPLETELY READ THE INDICTMENT BEFORE RULING ON THE SUFFICIENCY THEREOF.

During the presentation of the defendants' case the Court made a statement with respect to The Handbook which indicated that the Court had not read parts of The Handbook. Prior to this incident, the Court had denied the defendants' motions for dismissal of the indictment and for acquittal at the close of the Government's case. The issue presented by this situation is an issue only if one assumes that the stipulation requires that the Court consider the materials as part of the indictment. We assume this to be the case for purposes of disposing of defendants' contention.

It is axiomatic that in ruling on motions involving the sufficiency of an indictment, the Court should read that indictment. We agree, therefore, that the indictment should be read by the Court. However, the Court did read the indictments involved herein before any decisions were made on any aspects of this case. It is true that not all, that is to say, not each and every word or sentence of each of the indicted materials was read in advance of all of the Court's rulings. Nevertheless, the original indictments were read. Moreover, the Court read enough of the indicted materials to be able to rule as a matter of law that the Government had made out a prima facie case. We do not deem it necessary to read each and every word or sentence of the indicted materials in an obscenity case in order to ascertain whether there is a prima facie case.

While it is true that in considering material in an obscenity case, the work as a whole must be examined; *Roth v. United States,* 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957); it is not necessary to make a detailed and exhaustive examination on preliminary motions. Common sense dictates a realistic approach to this matter. The Handbook has 240 pages exclusive of introductory material.

The material therein is extremely boring, disgusting, and shocking to this Court, as well as to an average reader. It was simply too offensive to stomach in the first instance. Even a fast reading, skipping the obviously repetitious phrases and descriptions, readily discloses the impact and essence of the book.

The rule is that when a defendant presents testimony and other evidence after a motion for acquittal has been overruled, the objections to the denial of his motion are waived *United States v. Calderon*, 348 U. S. 160, 75 S. Ct. 186, 99 L. Ed. 202 (1954).

On the merits, since the Trial Court has since read all of The Handbook word by word, if there was error it is harmless. If in fact the material is obscene as a matter of fact and law, defendant was not prejudiced. This case was tried without a jury and the ultimate test after the case was submitted to the fact finder was much higher than it was when the Court disposed of defendants' pretrial motions.

FAILURE OF THE TRIAL COURT TO ENTER SPECIAL FINDINGS CONCURRENTLY WITH THE GENERAL FINDING.

It may be that better practice in many criminal cases calls for the entry of special findings at the time the general finding is made when the Court sits without a jury. *Benchwick v. United States*, 297 F. 2d 330 (9th Cir. 1961). This does not mean that it is required that both types of findings be made simultaneously. No case has been cited by counsel which so holds, and in like manner, exhaustive research discloses no such rule as contended for by defendants.

During the trial the Court made it clear to counsel on more than one occasion that the entry of special findings would be delayed beyond the entry of a general finding if a general finding of guilty was to be entered on any of the counts. There were no objections by defendants' counsel

to this proposed procedure. Thus, any objection to the delayed entry of special findings was waived by silence on the record. Likewise after verdict was rendered by the Court, no objections were stated for the record at that time.

On the merits, this was not an ordinary criminal case where fundamental operative facts had to be determined. Most of the facts are not clear and precise but instead are mixed with questions of law. This is the nature of the case. It is necessary in such a case for the Court to carefully consider all the legal ramifications of the factual setting, which is really largely agreed upon. Such careful consideration requires detailed legal research and assistance of counsel. Consequently, the Trial Court requested proposed findings and such other assistance as counsel could offer. Defendants were not precluded from submitting findings but apparently chose not to do so. We find no merit in this issue raised by them, apparently as an afterthought.

OBSCENITY.

The remaining contentions of defendant attack the decision of the Court that as a matter of fact and of law the indicted materials are obscene under 18 U. S. C. § 1461.

In order that freedom of speech may remain protected and inviolate, the law requires definite standards for a finding of obscenity. These standards are set forth generally in the case of *Roth v. United States (California)*, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). All ideas, no matter how obnoxious, unorthodox or controversial are protected. If material has any socially redeeming importance it is protected. Beyond this, material to be obscene must encroach upon significant interests of society, and thereby injure society without justification. Ma-

terial embodied in permanent form and distributed generally does this when it is obscene. *Roth v. United States (California), supra.* Something is obscene according to the A. L. I., Model Penal Code, § 207.10(2):

> "* * * (I)f, considered as a whole, its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. * * *"

Roth v. California, supra, 354 U. S. at page 489, 77 S. Ct. 1311, 1 L. Ed. 2d 1498, requires further that the material to be obscene must appeal in the above manner to the prurient interest of the average person, applying contemporary community standards. This has been held to mean that the standard is not to be applied from the point of view of particularly susceptible persons in the community. *Manual Enterprises v. Day,* 370 U. S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639 (1962).

In deciding whether the subject materials are obscene, each must of course be separately treated.

"LIAISON" VOL. 1, No. 1.

Liaison is a newsletter or periodical folder type of publication consisting of co mentary from various sources with a general editorial treatment. Specifically it deals with such subjects as "Slaying the Sex Dragon", ["]Semen in the Diet" and "Sing a Song of Sex Life." The material covers the most perverse and offensive human behavior. While the treatment is largely superficial, it is presented entirely without restraint of any kind. According to defendants' own expert, it is entirely without literary merit. We agree. If there is any socially redeeming value in this material it must come from what is advocated or from its

entertainment value. There are jokes and rhymes which clearly go beyond contemporary community standards of humor, even in applying liberal night club standards. The remainder of the material is of the same nature and exceeds the standard in the same manner.

One could take an entirely different view of some of the material in Liaison if it were artfully contrived or manipulated in a literary manner by incorporation into a work of merit to serve a legitimate purpose of an author in recording human experience or in seeking to accomplish a worthy objective. See, for example, *Grove Press, Inc. v. Christenberry,* 276 F. 2d 433 (2d Cir. 1960) where it was held that the book Lady Chatterley's Lover was not obscene.

Unfortunately, however, Liaison is designed obviously and solely for the purpose of appealing to the prurient interest of an ordinary person. The only idea advocated is complete abandon of any restraint with regard to any form of sexual expression. This "idea" is nothing more than could be advocated by the most flagrant pornography, samples of which were submitted to the Court by defendants as examples of obscenity. Ideas must go beyond this point in order to be protected. The alternative is the absence of any restraint on written material from the point of view of obscenity.

"Eros" Vol. 1, No. 4, 1962.

Eros is a carefully contrived magazine or periodical type of publication with a hard cover and glossy paper. It is replete with photographs and includes reproductions of recognized works of art. Nevertheless, as in the cases of Liaison and of The Handbook the dominant appeal is to pruriency. The works of art, such as biblical quotations and reproductions of the creations of recognized artists,

are merely a facade to disguise and protect the basic purpose and effect of the entire work. This basic purpose and effect becomes evident as one progresses through the pages.

Although it is difficult to classify all of the articles in Eros into specific categories, there is a clearly defined arrangement to the material. To some, several articles might be considered innocuous, only slightly erotic and possibly not obscene in and of themselves. These are: "New Twists and 3 Great Trysts"; "The Jewel Box Revue", the series of photographs on marriage, circa 1903; The Short Story by Ray Bradbury; "Memoirs of a Male Chaperon"; "President Harding's Second Lady"; "Was Shakespeare a Homosexual"; "Sex and the Bible"; and perhaps Ivan Graznis' version of "Lysistrata". If the entire work consisted merely of these articles there might be no finding of obscenity in this case. This does not mean that the articles have no effect upon the finding of obscenity with regard to the periodical as a whole. Here is a pattern. Here is a craftily compiled overall effect and since the work must be considered as a whole, material which might be innocuous alone partakes of the obscenity elsewhere in Eros and becomes part and parcel of the overall plan and intent of the work. It is the opposite of the usual situation as in a novel where the dominant interest and theme is of social importance, and what would be patent obscenity standing alone is insulated and protected and saved from condemnation because of the work of art in which it is incorporated. *Grove Press, Inc. v. Christenberry, supra.*

Eros is the reverse situation from Lady Chatterley's Lover. There the author used material which, *taken out of context*, would have been clearly obscene. Nevertheless, the court found no obscenity because of the saving grace of the book as a whole. Eros has no saving grace. The items of possible merit and those items which might be

considered innocuous are a mere disguise to avoid the law and in large measure enhance the pruriency of the entire work. The only overriding theme of Eros is the advocacy of complete sexual expression of whatever sort and manner. The most offensive pornography imaginable, examples of which were submitted by defendants as exhibits in this case, has the same dominant effect and purpose. Even so, of course, the dissemination of the idea of complete sexual freedom cannot constitutionally be punished. Therefore, it must be the *manner* of dissemination which is objectionable.

In considering the manner of expression of the idea then, we come to the work itself in its obscene portions. The articles called: "Frank Harris, His Life and Loves" including "My Life and Loves" by Frank Harris; "Bawdy Limericks" and the "Natural Superiority of Women as Erotocists" and "Black and White in Color" are such that standing alone, one has little difficulty in finding all of the requisite elements of obscenity. For example: "Bawdy Limericks" consists of the grossest terminology describing unnatural, offensive, disgusting and exaggerated sexual behavior. Also by way of example: the series of pictures, "Black and White in Color", constitutes a detailed portrayal of the act of sexual intercourse between a completely nude male and female, leaving nothing to the imagination. This material meets defendants' own experts' definition of obscenity as well as counsel's legal definition.

Pruriency is required and is defined as an itching, longing, morbid or shameful sexual desire. *Roth v. California, supra.* When material creates in the reader shame and guilt feelings simultaneously with sexual arousal, the result is usually obscenity. The material listed above clearly qualifies. There is no notable distinction between the aforesaid, taking each one as a whole, and the admit-

tedly obscene material which was in evidence for comparison purposes.

The impact of these articles and items is sufficient to permeate the entire volume of Eros. By reading the article "A Letter from Allen Ginsburg" it becomes evident that the intent of the disseminator here was to cause this permeation, i. e., this "Letter" is a statement of the purpose of Eros. It is clear that there is no possible other way to view the matter. When material is composed of several portions, not related except insofar as each deals with sex in various forms, and at the same time this material includes obscene items, if these items are tested standing alone and if at the same time a single purpose of destruction of all barriers against sexual behavior of any kind is advocated along with the advocacy of removal of restraint by government over the dissemination of any written material whatsoever, there is but one conclusion. That conclusion is: there is specific intent to destroy any limitations whatsoever over any medium of human communication regardless of the extent of abuse of that medium through the use of obscenity. Therefore, defendants are in the unsavory position of advocating that obscenity should be disseminated, and at the same time they are deliberately purveying material through the mails which material is designed to break down those barriers imposed by the statute.

The inserting of innocuous material along with obscene material cannot shield the latter. If it could, the Bible itself could readily be rendered obscene, and yet could be disseminated without restraint, merely through the expediency of illustrating sexual references with the grossest pornographic photographs and by giving the participants biblical names. The answer is clear. It is one thing to create an integrated work of art containing what would be

obscenity standing alone, and another thing to create an integrated work of obscenity containing excerpts from recognized works of art.

It is interesting to note that in defining pornography, defendants' expert stated that it is common in such material that matters usually treated with respect, such as religion, are juxtaposed with and mocked by the writer. Inaccuracy and imaginary psychotic references to sexual activity is rampant in such works. Eros contains these elements. The front and back covers and the lead article deal with the Bible itself. "Bawdy Limericks" meets the test of bizarre and unrealistic treatment of sex. "The Sexual Side of Anti-Semitism" is headlined with a paragraph taken from the mouth of a psychotic person. These examples, and those elsewhere in this opinion, are offered as typical and are not by any means designed to constitute an exhaustive exposition of all of the material relevant to a finding of obscenity in detail. To do this would require a good-sized novel. Defendants press us for a quick disposition in order that their business not be ruined since they fear to continue publishing in the face of the finding of guilt. We, therefore, doubt that defendants are interested in a large volume of discourse in this opinion.

"THE HOUSEWIFE'S HANDBOOK ON SELECTIVE PROMISCUITY" BY REY ANTHONY.

The Handbook requires little discussion. This book is a kind with the above-mentioned admittedly hardcore pornography. It is an explicit description of a woman's sexual experiences from early childhood and thereafter throughout most of her life. It purports to be, and the authoress so stated under oath, a factual and highly accurate reporting of actual occurrences. In fact Mrs. Lillian Maxine Serett, the authoress, stated: "I have lived every

minute of it, or every page of it * * *'' (N. T. page 121). We doubt the accuracy of this book. It also easily meets the previously mentioned tests of bizarre exaggeration, morbidness and offensiveness.

The Handbook's description of various sexual acts is astounding. As in the case of Liaison, no literary merit is ascribed to the book. Its sole claim to redeeming value is its alleged value as a clinical device to ''ventilate'' persons with sexual inhibitions and misconceptions. Any testimony to this effect is expressly disbelieved by this Court. One must regretfully note in passing that teen-age children were, and would be in the future, ''ventilated'' with this book by the witness who was alleged to be an expert clinical psychologist and also was an ordained minister. This same witness shocked the writer by saying that this book should be in every home and available for teen-agers for guidance in sex behavior, but in my opinion misbehavior.

The Handbook, standing bare of any socially redeeming value, is a patent offense to the most liberal morality. The descriptions leave nothing to the imagination, and in detail, in a clearly prurient manner offend, degrade and sicken anyone however healthy his mind was before exposure to this material. It is a gross shock to the mind and chore to read. Pruriency and disgust coalesce here creating a perfect example of hardcore pornography.

Conclusion.

Defendants place great weight on the requirement of the definition of obscenity, as they see it, which protects works which do not exceed contemporary community standards of candor in expression. There is no question that all three of the indicted materials exceed this standard. Certain materials sold openly on local newstands were

submitted to show what the acceptable limits of candor are today. Without so deciding, it may well be that these materials exceed the contemporary standard themselves. At any rate, supplying this Court with such materials does not provide conclusive evidence of the standard set by the community as a whole. Doubtless but a sliver of the community reads such things and there is no doubt the community as a whole does not necessarily tolerate them. For all the Court knows, local action before this and in the future will result in the removal of this type of material from the newsstands. This Court has the power and the right as a fact finder and as one who is aware of all types of material sold, tolerated and not tolerated by the community as a whole, to find, as it has found, that the material in question exceeds the standard. It does so unequivocally.

We have been regaled with the theory that the susceptibility of no single segment of the community is to be the paramount consideration in deciding whether a work is obscene. *Manual Enterprises v. Day, supra.* This is the law and we do not argue with it. It is also the law that the community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community. The community as a whole is not an ideal man who wouldn't seek and read obscenity in the first place. Otherwise no restraint at all would be required. Some is proper. *Roth v. California, supra.* Therefore, an ideal person without any failings or susceptibility is not the man to protect. Society as a whole, replete of course with various imperfections, must be protected.

There must come a time when the law must take a stand and determine what is legally obscene. It is all a matter of degree. Each publication is to be judged by itself, cover to

cover, and as a whole. It is not merely a matter of four letter words, or the quantity of them. It is a matter of our concept of obscenity as defined and limited by the United States Supreme Court.

ORDER.

And now, this twenty-first day of November, 1963, in accordance with the foregoing opinion, it is ordered that the motions of defendants in Arrest of Judgment and, in the alternative, for a New Trial, be and the same are hereby denied.

It is further ordered that the defendants are called for sentence on November 27, 1963 at 10:00 A. M. in a courtroom of the United States District Court for the Eastern District of Pennsylvania.

UNITED STATES of America,

v.

Ralph GINZBURG, Documentary Books, Inc., Eros Magazine, Inc. and Liaison News Letter, Inc., Appellants.

Nos. 14742-14745.

UNITED STATES COURT OF APPEALS

Third Circuit

Argued June 16, 1964.

Decided Nov. 6, 1964.

David I. Shapiro, Washington, D. C. (Sidney Dickstein, Washington, D. C., Norman Oshtry, Philadelphia, Pa., on the brief), for appellants.

J. Shane Creamer, Asst. U. S. Atty., Philadelphia, Pa. (Drew J. T. O'Keefe, U. S. Atty., Philadelphia, Pa., on the brief), for appellee.

Morey M. Myers, Scranton, Pa., Murry Powlen, Philadelphia, Pa., Melvin L. Wulf, New York City, on the brief for American Civil Liberties Union and Its Pennsylvania Affiliate, amici curiae.

Before McLaughlin, Kaloder and Staley, Circuit Judges.

McLaughlin, Circuit Judge.

Appellants were convicted of violating the federal obscenity law, 18 U. S. C. § 1461. All three publications involved were found to be obscene under the statute. The record shows that in September, 1962, appellant Eros Magazine, Inc. of which appellant Ginzburg was editor and publisher, after a great deal of deliberation endeavored to ob-

tain what was considered advantageous mailing privileges from Blue Ball, Pennsylvania. Meeting with no success there, a similar try was made with the Post Office at Intercourse, Pennsylvania. Again rejected, a final successful effort was made at the Middlesex, New Jersey Post Office from which over five million advertisements of Eros were mailed. It is not disputed that the bulk of the mailings for the three publications was from Middlesex. In the advertisements above mentioned, inter alia, appeared the following:

> "The publication of this magazine—which is frankly and avowedly concerned with erotica—has been enabled by recent court decisions * * * to be published."

The magazine Eros was thereafter mailed out from Middlesex. It is with Volume 1, No. 4, 1962 thereof that we are concerned. Eros is a quarterly. Its price is $25. a year.

The second publication was mailed in November, 1962. It was a book which had been originally titled by its author "The Housewife's Handbook for Promiscuity". That book so titled had been sold by mail to a selected list by the author. The title was later changed to read "Housewife's Handbook on Selective Promscuity". The mailing in this instance was under the latter title. Its price is $4.95.

The third publication is a biweekly newsletter called Liaison. According to the witness Darr who was hired by appellant Ginzburg as editor of Liaison, Ginzburg told him that "* * * Liaison was to cover the same scope [as Eros], in a more newsworthy fashion." Darr was hired after he had specially written and submitted a piece titled "How to Run a Successful Orgy". Ginzburg telephoned him and asked him "When can you start to work?" The particular piece in revised form was published in Liaison. The price of Liaison was $15, later reduced to $4.95.

The advertising material, concededly not obscene of itself, was admittedly mailed by appellants on the specified dates with full knowledge of its contents.

The case was tried to the court, a jury trial having been waived by appellants. The trial consumed five days. Appellants were found guilty on all counts on June 14, 1963. Later, at the request of the appellants, on August 6, 1963, the court filed special detailed findings of fact. Summing up those findings, the court said:

> "In conclusion, after a thorough reading and review of all the indicted materials, this Court finds that said materials are compilations or sordid narrations dealing with six, in each case in a manner designed to appeal to prurient interests. They are devoid of theme or ideas. Throughout the pages of each can be found constant repetition of patently offensive words used solely to convey debasing portrayals of natural and unnatural sexual experiences. Each in its own way is a blow to sense, not merely sensibility. They are all dirt for dirt's sake and dirt for money's sake."

We have read, examined and considered the publications involved in this appeal, "* * * in the light of the record made in the trial court, * * *." *Jacobellis v. Ohio,* 378 U. S. 184, 196, 84 S. Ct. 1676, 1682, 12 L. Ed. 2d 793 (1964). The only important question before us is whether the publications are obscene under the federal statute. Since this calls for a constitutional judgment it is our duty to decide it. Under the obscenity tests laid down by the Supreme Court, the Constitutional status of the publications "* * * must be determined on the basis of a national standard." *Jacobellis, supra,* p. 195, 84 S. Ct. p. 1682. This is peculiarly fitting here where over five million advertisements for the Eros material were mailed out to prospects in this country.

Also we have very much in mind that as the Supreme Court stated in *Roth v. United States,* 354 U. S. 476, 484, 77 S. Ct. 1304, 1309, 1 L. Ed. 2d 1498 (1957):

> "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

The Court went on to say, 354 U. S. p. 487, 77 S. Ct. p. 1310, that "* * * sex and obscenity are not synonymous" and ruled on p. 487, 77 S. Ct. p. 1310 that "Obscene material is material which deals with sex in a manner appealing to prurient interest." It quoted with approval the American Law Institute, Model Penal Code, proposed official draft (May 4, 1962), § 251.41(1):

> "'* * * A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. * * *'"

The same necessary quality named in *Roth, supra,* and *Jacobellis, supra,* as affronting current national community standards is described in *Manual Enterprises v. Day,* 370 U. S. 478, 482, 82 S. Ct. 1432, 8 L. Ed. 2d 639 (1962) as "'patent offensiveness' or 'indecency'". At pages 483, 484, 82 S. Ct. pages 1434-1435, the Day opinion, speaking of the federal obscenity law, notes that "* * * the statute since its inception has always been taken as aimed at obnoxiously

debasing portrayals of sex. * * * the statute reaches only indecent material which, as now expressed in *Roth v. United States, supra,* 354 U. S. at 489, 77 S. Ct. at 1311, 'taken as a whole appeals to prurient interest.' "

This brings us to the special circumstances revealed in the present appeal. We are not dealing with a novel by a well known novelist, written as and for a work of fiction with a firm base of opposition to well defined then existing social conditions, which was held mailable because its "* * * predominant appeal * * * [was] demonstrably not to 'prurient interest'." *Grove Press v. Christenberry,* 276 F. 2d 433, 437 (2 Cir. 1960). Nor have we in this appeal anything comparable to the autobiographical account of the scabrous life of a writer of some pretentions, where numerous revolting episodes were part of a text which the Supreme Court of Massachusetts (184 N. E. 2d 328, 334 (1962)) accepted "* * * as a conscious effort to create a work of literary art."

What confronts us is a sui generis operation on the part of experts in the shoddy business of pandering to and exploiting for money one of the great weaknesses of human being. Appellants' fundamental objective obviously was and is to, more or less openly, force their invitations to obscenity upon the American public through the United States mails. They did this in reliance on their own ill conceived theory that all barriers to obscenity have in effect been removed. They were not concerned with trying to circulate authentic artistic efforts that may incidentally have four letter words or nudity or sex as an integral part of a work, whatever art form it may be. Eros was declared as avowedly concerned with one thing, what in the prospectus is described as "erotica" and *which, it is stated, has been enabled to be published "by recent court decisions."* (Emphasis supplied.) An undeniable example of what was meant by erotica is the content of Eros, Vol. 1, No. 4.

Seemingly to soften their approach and to pick up whatever support that might be available, appellants offer separate defenses for each of the publications. For Eros it is claimed in the brief that it "has redeeming social importance with respect to literary and artistic values". Having in mind the above proclaimed objective, even a casual reading makes it readily apparent that bits of nonstatutory material have simply been laced into the obscene structure which is the Eros volume in evidence with the intent of creating that impression. This seems to us not just frivolous but a bold attempt to pioneer both in the elimination of the law itself and in the collection of the resultant profits. We have not seen nor been referred to any decision which countenances that sort of brazen chicanery. If permitted, it would stultify the carefully wrought formula whereby the basic law guarding the national community from obscenity it upheld but not at the expense of honest ideas founded on at least some social importance even if it be but the slightest.

From our own close reading and scrutiny of Eros, its basic material predominantly appeals to prurient interest; it is on its face offensive to present day national community standards, and it has no artistic or social value. The sham device of seeking to somewhat cloak the content with nonoffensive items falls of its own evil weight. Cf *Kahm v. United States*, 300 F. 2d 78 (5 Cir. 1962).

It is asserted that the Handbook has some social-scientific importance. Testimony along that line was expressly disbelieved by the trial judge. Our own reading and examination of this work leads us to the same conclusion. The original title to the book gives its real purpose. That title, "The Housewife's Handbook for Promiscuity" is a fitting capsule description of the content. The mere change in the title, making it sound like some sort of a text book or tract, shows the arrogant insistence of these appellants that raw obscenity it at this time properly an element

of national community life. There is nothing of any social importance in the Handbook. It is patently offensive to current national community standards. Applying those standards to the average person its dominant theme as a whole appeals to prurient interest.

Appellants would have it that the book fits into the same category as "Fanny Hill," found not obscene by the New York Court of Appeals in *Larkin et al. v. G. P. Putnam's Sons,* 14 N. Y. 2d 399, 252 N. Y. S. 2d 71, 200 N. E. 2d 760 (1964). Whatever may eventually be the outcome of that litigation, it has no bearing on this appeal for, inter alia, it was there specifically held as to the book that "It has a slight literary value and it affords some insight into the life and manners of mid-18th Century London."

It is argued that Liaison, the newsletter, is without the statute, on the ground that it does not appeal to prurient interest. As we have seen, according to Ginzburg, the directing head of all three publications, the purpose of Liaison was to cover the same scope as Eros, in a more newsworthy fashion. Our study of it bears out. Its material openly offends current national community standards in much the same fashion as does Eros. Taken as a whole, its appeal is directed to the prurient interest of the average person in the national community. The type of thing that it is, as visualized from the test given the successful candidate for its editor, is confirmed by the material printed in it. There is no pretension that it has any social significance or literary merit.

There is defense testimony which would have it that all three publications are not within the reach of the statute. The trier of the facts was not persuaded by it nor are we.

Finding, as we do, that Eros, the Handbook and Liaison are obscene, affirmance of the convictions on the advertising counts follows as of course.

The contentions of appellants that the convictions on the Eros and Liaison counts must be reversed because the trial court failed to find those publications guilty within the statute are without merit. This is clear as to Eros in the Special Findings of Fact, Nos. 16, 17, 18, 19, the concluding paragraph of the Findings above quoted and also, though it is not necessary, in the court's opinion under the caption "Eros Vol. 1, Number 4, 1962." The Liaison Findings, which fully substantiate conviction on those counts, are Numbers 11, 12, 13, 14, 15, the concluding paragraph of the Findings and also, though it is not necessary, the court's opinion under the caption "Liaison Vol. 1, No. 1."

There is no substance to the complaint regarding the time of filing of the Special Findings of Fact. Rule of Criminal Procedure 23(c) provides that: "In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially."

The trial court's comment in its opinion on this point which is in strict accord with the record, is as follows:

> "During the trial the Court made it clear to counsel on more than one occasion that the entry of special findings would be delayed beyond the entry of a general finding if a general finding of guilty was to be entered on any of the counts. There were no objections by defendants' counsel to this proposed procedure. Thus, any objection to the delayed entry of special findings was waived by silence on the record. Likewise after verdict was rendered by the Court, no objections were stated for the record at that time.
>
> "On the merits, this was not an ordinary criminal case where fundamental operative facts had to be determined. Most of the facts are not clear and precise but instead are mixed with questions of law. This is the nature of the case. It is necessary in such a case

for the Court to carefully consider all the legal ramifications of the factual setting, which is really largely agreed upon. Such careful consider requires detailed legal research and assistance of counsel. Consequently, the Trial Court requested proposed findings and such other assistance as counsel could offer. Defendants were not precluded from submitting findings but apparently chose not to do so. We find no merit in this issue raised by them, apparently as an afterthought."

Under the facts the findings were filed promptly and properly within the above rule.

It is also asserted that the trial court converted evidence of criminal intent admissible against one defendant into proof of criminal intent on the part of all defendants. This concerns the two unsuccessful attempts to mail out Eros advertising material. The successful mailings from Middlesex were for all three publications. The point is de minimis in any event. The stipulation between counsel for the parties and approved by the court states that the advertising material was mailed by the defendants on the occasions alleged in the indictments with full knowledge of the contents thereof. We do not find the slightest indication of any substantial confusion on the part of the trial judge with reference to the attempted mailings and mailings of the material involved in the appeal.

Appellants object to the admission of the rebuttal testimony of Government witness, Dr. Frignito. This testimony was rightfully presented and received as rebuttal evidence. The witness' complete answer as to the effect of the Handbook makes it evident that he was considering the book's effect on the entire community, not some group thereof. We find no error in this connection.

Appellants claim error because at the time of the defense motions for dismissal of the indictment and for ac-

quittal at the end of the Government's case, the trial judge who had read the indictment, as he says in his opinion, had not read at that time "* * * each and every word or sentence of each of the indicted materials * * *" but, as he further said, "* * * the Court read enough of the indicted materials to be able to rule as a matter of law that the Government had made out a prima facie case." There is no prejudicial error in this incident.

Finally, appellants urge that the court erred in striking the affidavit and exhibits in support of the defense motion to dismiss the indictment. The defense on that motion was correctly limited by the court to the face of the indictment and whether it accurately charged the named offenses and gave adequate notification thereof to the defendants. The defense attempted by the affidavit and letters to put before the court in ex parte form, opinions from various sources favorable to the Handbook. These were trial matters and so held by the judge.

The district judge was acutely aware of the issue of constitutional law raised in this action. He was conversant with the Supreme Court's views on the federal obscenity statute and was guided accordingly. Our study of the record, including the transcript and convicted materials, establishes that he tried it fairly, carefully and competently. He made no substantial errors of law. We are convinced that, under the evidence, he was justified in finding the defendants guilty on all counts. As we have indicated, we have independently arrived at that same conclusion.

The judgments of the district court will be affirmed.

No. 807. RALPH GINZBURG et al., Petitioners, v. UNITED STATES, 380 U. S. 961, 14 L. Ed. 2d 152, 85 S. Ct. 1103.

April 5, 1965. The motion of Lillian Maxine Serett for leave to file a brief, as amicus curiae, is granted. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit granted and case placed on the summary calendar.

Same case below, 338 F. 2d 12.

David I. Shapiro and Sidney Dickstein for petitioners.

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and Marshall Tamor Golding for the United States, amici curiae, in support of the petition.

Melvin L. Wulf for the American Civil Liberties Union et al., amici curiae, in support of the petition.

Edward de Grazia for Boyle et al., amici curiae in support of the petition.

Irwin Karp for the Authors League of America, Inc., amici curiae, in support of the petition.

Stanley Fleishman and Sam Rosenwein for Serett, amici curiae, in support of the petition.

RALPH GINZBURG ET AL.,

Petitioners,

v.

UNITED STATES, 383 U. S. 463, 16 L. Ed. 2d 31, 86 S. Ct. 942, reh den 384 U. S. 934, 16 L. Ed. 2d 536, 86 S. Ct. 1440.

[No. 42]

Argued December 7, 1965. Decided March 21, 1966.

APPEARANCES OF COUNSEL.

Sidney Dickstein argued the cause for petitioners.

Paul Bender argued the cause for respondent, pro hac vice, by special leave of Court.

OPINION OF THE COURT.

Mr. Justice **Brennan** delivered the opinion of the Court.

A judge sitting without a jury in the District Court for the Eastern District of Pennsylvania [1] convicted petitioner Ginzburg and three corporations controlled by him upon all 28 counts of an indictment charging violation of

1. No challenge was or is made to venue under 18 USC § 3237 (1964 ed.).

the federal obscenity statute, 18 USC § 1461 (1964 ed.).[2] 224 F. Supp. 139. Each count alleged that a resident of the Eastern District received mailed matter, either one of three publications challenged as obscene, or advertising telling how and where the publications might be obtained. The Court of Appeals for the Third Circuit affirmed, 338 F. 2d 12. We granted certiorari, 380 U. S. 961, 14 L. ed. 2d 152, 85 S. Ct. 1103. We affirm. Since petitioners do not argue that the trial judge misconceived or failed to apply the standards we first enunciated in *Roth v. United States*, 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304,[3] the only serious question is whether those standards were correctly applied.[4]

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2. The federal obscenity statute, 18 USC § 1461, provides in pertinent part:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> . . .
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters . . . may be obtained . . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense . . . ."

3. We are not, however, to be understood as approving all aspects of the trial judge's exergesis of Roth, for example his remarks that "the community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community." 224 F. Supp. at 137. Compare Butler v. Michigan, 352 U. S. 380, 1 L. ed. 2d 412, 77 S. Ct. 524.

4. The Government stipulated at trial that the circulars advertising the publications were not themselves obscene; therefore the convictions on the counts for mailing the advertising stand only if the mailing of the publications offended the statute.

In the cases in which this Court has decided obscenity questions since Roth, it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise. As in *Mishkin v. New York,* 383 U. S. 502, 16 L. ed. 2d 56, 86 S. Ct. 958, and as did the courts below, 224 F. Supp., at 134, 338 F. 2d, at 14-15, we view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal.[5] The record in that regard amply supports the decision of the trial judge that the mailing of all three publications offended the statute.[6]

The three publications were EROS, a hard-cover magazine of expensive format; Liaison, a bi-weekly newsletter;

5. Our affirmance of the convictions for mailing EROS and Liaison is based upon their characteristics as a whole, including their editorial formats, and not upon particular articles contained, digested, or excerpted in them. Thus we do not decide whether particular articles, for example, in EROS, although identified by the trial judge as offensive, should be condemned as obscene whatever their setting. Similarly, we accept the Government's concession, note 13, *infra,* that the prosecution rested upon the manner in which the petitioners sold the Handbook; thus our affirmance implies no agreement with the trial judge's characterizations of the book outside that setting.

6. It is suggested in dissent that petitioners were unaware that the record being established could be used in support of such an approach, and that petitioners should be afforded the opportunity of a new trial. However, the trial transcript clearly reveals that at several points the Government announced its theory that made the mode of distribution relevant to the determination of obscenity, and the trial court admitted evidence, otherwise irrelevant, toward that end.

and The Housewife's Handbook on Selective Promiscuity (hereinafter the Handbook), a short book. The issue of EROS specified in the indictment, Vol. 1, No. 4, contains 15 articles and photo-essays on the subject of love, sex, and sexual relations. The specified issue of Liaison, Vol. 1, No. 1, contains a prefatory "Letter from the Editors" announcing its dedication to "keeping sex an art and preventing it from becoming a science." The remainder of the issue consists of digests of two articles concerning sex and sexual relations which had earlier appeared in professional journals and a report of an interview with a psychotherapist who favors the broadest license in sexual relationships. As the trial judge noted, "[w]hile the treatment is largely superficial, it is presented entirely without restraint of any kind. According to defendants' own expert, it is entirely without literary merit." 224 F. Supp. at 134. The Handbook purports to be a sexual autobiography detailing with complete candor the author's sexual experiences from age 3 to age 36. The text includes, and prefatory and concluding sections of the book elaborate, her views on such subjects as sex education of children, laws regulating private consensual adult sexual practices, and the equality of women in sexual relationships. It was claimed at trial that women would find the book valuable, for example as a marriage manual or as an aid to the sex education of their children.

Besides testimony as to the merit of the material, there was abundant evidence to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—"the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."[7] EROS early sought mailing privileges from the postmasters of Intercourse and Blue Ball, Pennsylvania. The trial court found the obvious,

7. Roth v. United States, supra, 354 U. S. at 495, 496, 1 L. ed. 2d at 1513 (Warren, C. J., concurring).

that these hamlets were chosen only for the value their names would have in furthering petitioners' efforts to sell their publications on the basis of salacious appeal;[8] the facilities of the post offices were inadequate to handle the anticipated volume of mail, and the privileges were denied. Mailing privileges were then obtained from the postmaster of Middlesex, New Jersey. EROS and Liaison thereafter mailed several million circulars soliciting subscriptions from that post office; over 5,500 copies of the Handbook were mailed.

The "leer of the sensualist" also permeates the advertising for the three publications. The circulars sent for EROS and Liaison stressed the sexual candor of the respective publications, and openly boasted that the publishers would take full advantage of what they regarded an unre-

8. Evidence relating to petitioners' efforts to secure mailing privileges from these post offices was, contrary to the suggestion of Mr. Justice Harlan in dissent, introduced for the purpose of supporting such a finding. Scienter had been stipulated prior to trial. The Government's position was revealed in the following colloquy, which occurred when it sought to introduce a letter to the postmaster of Blue Ball, Pennsylvania:

"THE COURT. Who signed the letter?

"MR. CREAMER. It is signed by Frank R. Brady, Associate Publisher of Mr. Ginzburg. It is on Eros Magazine, Incorporated's stationery.

"THE COURT. And your objection is—

"MR. SHAPIRO. It is in no way relevant to the particular issue or publication upon which the defendant has been indicted and in my view, even if there was an identification with respect to a particular issue, it would be of doubtful relevance in that event.

"THE COURT. Anything else to say?

"MR. CREAMER. If Your Honor pleases, there is a statement in this letter indicating that it would be advantageous to this publication to have it disseminated through Blue Ball, Pennsylvania, post office. I think this clearly goes to intent, as to what the purpose of publishing these magazines was. At least, it clearly establishes one of the reasons why they were disseminating this material.

"THE COURT. Admitted."

stricted license allowed by law in the expression of sex and sexual matters.[9] The advertising for the Handbook, apparently [m]ailed from New York, consisted almost entirely of a reproduction of the introduction of the book, written by one Dr. Albert Ellis. Although he alludes to the book's in-

9. Thus, one EROS advertisement claimed:

"Eros is a child of its times. . . . [It] is the result of recent court decisions that have realistically interpreted America's obscenity laws and that have given to this country a new breadth of freedom of expression. . . . EROS takes full advantage of this new freedom of expression. It is *the* magazine of sexual candor."

In another, more lavish spread:

"EROS is a new quarterly devoted to the subjects of Love and Sex. In the few short weeks since its birth, EROS has established itself as the rave of the American intellectual community —and the rage of prudes everywhere! And it's no wonder: EROS handles the subjects of Love and Sex with complete candor. The publication of this magazine—which is frankly and avowedly concerned with erotica—has been enabled by recent court decisions ruling that a literary piece or painting, though explicity sexual in content, has a right to be published if it is a genuine work of art.

"EROS is a genuine work of art. . . ."

An undisclosed number of advertisements for Liaison were mailed. The outer envelopes of these ads ask, "Are you among the chosen few?" The first line of the advertisement eliminates the ambiguity: "Are you a member of the sexual elite?" It continues:

"That is, are you among the few happy and enlightened individuals who believe that a man and woman can make love without feeling pangs of conscience? Can you read about love and sex and discuss them without blushing and stammering?

"If so, you ought to know about an important new periodical called Liaison.

. . .

"In short, Liaison is Cupid's Chronicle. . . .

"Though Liaison handles the subjects of love and sex with complete candor, I wish to make it clear that it is not a scandal sheet and it is not written for the man in the street. Liaison is aimed at intelligent, educated adults who can accept love and sex as part of life.

". . . I'll venture to say that after you've read your first bi-weekly issue, Liaison will be your most eagerly awaited piece of mail."

formational value and its putative therapeutic usefulness, his remarks are preoccupied with the book's sexual imagery. The solicitation was indiscriminate, not limited to those, such as physicians or psychiatrists, who might independently discern the book's therapeutic worth.[10] Inserted in each advertisement was a slip labeled "GUARANTEE" and reading, "Documentary Books, Inc. unconditionally guarantees full refund of the price of THE HOUSEWIFE'S HANDBOOK ON SELECTIVE PROMISCUITY if the book fails to reach you because of U. S. Post Office censorship interference." Similar slips appeared in the advertising for EROS and Liaison; they highlighted the gloss petitioners put on the publications, eliminating any doubt what the purchaser was being asked to buy.[11]

This evidence, in our view, was relevant in determining the ultimate question of obscenity and, in the context of this record, serves to resolve all ambiguity and doubt. The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the

10. Note 13, *infra*.

11. There is much additional evidence supporting the conclusion of petitioners' pandering. One of petitioners' former writers for Liaison, for example, testified about the editorial goals and practices of that publication.

marketplace or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the Roth test.

A proposition argued as to EROS, for example, is that the trial judge improperly found the magazine to be obscene as a whole, since he concluded that only four of the 15 articles predominantly appealed to prurient interest and substantially exceeded community standards of candor, while the other articles were admittedly nonoffensive. But the trial judge found that "[t]he deliberate and studied arrangement of EROS is editorialized for the purpose of appealing predominantly to prurient interest and to insulate through the inclusion of nonoffensive material." 224 F. Supp., at 131. However erroneous such a conclusion might be if unsupported by the evidence of pandering, the record here supports it. EROS was created, represented and sold solely as a claimed instrument of the sexual stimulation it would bring. Like the other publications, its pervasive treatment of sex and sexual matters rendered it available to exploitation by those who would make a business of pandering to "the widespread weakness for titillation by pornography."[12] Petitioners' own expert agreed, correctly we think, that "[i]f the object [of a work] is material gain for the creator through an appeal to the sexual curiosity and appetite," the work is pornographic. In other words, by animating sensual detail to give the publication a salicious cast, petitioners reinforced what is

12. Schwartz, Morals Offenses and the Model Penal Code, 63 Col. L. Rev. 669, 677 (1963).

conceded by the Government to be an otherwise debatable conclusion.

A similar analysis applies to the judgment regarding the Handbook. The bulk of the proofs directed to social importance concerned this publication. Before selling publication rights to petitioners, its author had printed it privately; she sent circulars to persons whose names appeared on membership lists of medical and psychiatric associations, asserting its value as an adjunct to therapy. Over 12,000 sales resulted from this solicitation, and a number of witnesses testified that they found the work useful in their professional practice. The Government does not seriously contest the claim that the book has worth in such a controlled, or even neutral, environment. Petitioners, however, did not sell the book to such a limited audience, or focus their claims for it on its supposed therapeutic or educational value; rather, they deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed. They proclaimed its obscenity; and we cannot conclude that the court below erred in taking their own evaluation at its face value and declaring the book as a whole obscene despite the other evidence.[13]

The decision in *United States v. Rebhuhn*, 109 F. 2d 512, is persuasive authority for our conclusion.[14] That

13. The Government drew a distinction between the author's and petitioners' solicitation. At the sentencing proceeding the United States Attorney stated:

> ". . . [the author] was distributing . . . only to physicians; she never had widespread, indiscriminate distribution of the Handbook, and, consequently, the Post Office Department did not interfere . . . . If Mr. Ginzburg had distributed and sold and advertised these books solely to . . . physicians . . . we, of course, would not be here this morning with regard to The Housewife's Handbook . . . ."

14. The Proposed Official Draft of the ALI Model Penal Code likewise recognizes the question of pandering as relevant to the obscenity issue, § 251.4(4); Tentative Draft No. 6 (May 6, 1957),

was a prosecution under the predecessor to § 1461, brought in the context of pandering of publications assumed useful to scholars and members of learned professions. The books involved were written by authors proved in many instances to have been men of scientific standing, as anthropologists or psychiatrists. The Court of Appeals for the Second Circuit therefore assumed that many of the books were entitled to the protection of the First Amendment, and "could lawfully have passed through the mails, if directed to those who would be likely to use them for the purposes for which they were written . . ." 109 F. 2d, at 514. But the evidence, as here, was that the defendants had not disseminated them for their "proper use, but . . . woefully misused them, and it was that misuse which constituted the gravamen of the crime." *Id.*, at 515. Speaking for the Court in affirming the conviction, Judge Learned Hand said:

> ". . . [T]he works themselves had a place, though a limited one, in anthropology and in psychotherapy. They might also have been lawfully sold to laymen who wished seriously to study the sexual practices of savage or barbarous peoples, or sexual aberrations; in other words, most of them were not obscene per se. In several decisions we have held that the statute does not in all circumstances forbid the dissemination of such publications . . . . However, in the case at bar, the prosecution succeeded . . . when it showed that the defendants had indiscriminately flooded the mails

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14 (cont'd)

pp. 1-3, 13-17, 45-46, 53; Schwartz, *supra*, n. 12; see Craig, Suppressed Books, 195-206 (1963). Compare *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 496-497 (DCSD NY 1959), aff'd. 276 F. 2d 433 (CA 2d Cir. 1960); *United States v. One Book Entitled Ulysses*, 72 F. 2d 705, 707 (CA 2d Cir. 1934), affirming 5 F. Supp. 182 (DCSD NY 1933). See also *The Trial of Lady Chatterly —Regina v. Penguin Books, Ltd.* (Rolph ed. 1961).

> with advertisements, plainly designed merely to catch the prurient, though under the guise of distributing works of scientific or literary merit. We do not mean that the distributor of such works is charged with a duty to insure that they shall reach only proper hands, nor need to say what care he must use, for these defendants exceeded any possible limit; the circulars were no more than appeals to the salaciously disposed, and no [fact finder] could have failed to pierce the fragile screen, set up to cover that purpose." 109 F. 2d, at 514-515.

We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the Roth test.[15] No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.[16] Rather, the fact that each of these publications was created or exploited

15. Our conclusion is consistent with the statutory scheme. Although § 1461, in referring to "obscene . . . matter" may appear to deal with the qualities of material in the abstract, it is settled that the mode of distribution may be a significant part in the determination of the obscenity of the material involved. *United States v. Rebhuhn, supra.* Because the statute creates a criminal remedy, cf. *Manual Enterprises v. Day,* 370 U. S. 478, 495, 8 L. ed. 2d 639, 651, 82 S. Ct. 1432 (opinion of Brennan, J.), it readily admits such an interpretation, compare *United States v. 31 Photographs, etc.,* 156 F. Supp. 350 (DCSD NY 1957).

16. See *New York Times v. Sullivan,* 376 U. S. 254, 265-266, 11 L. ed. 2d 686, 697-698, 84 S. Ct. 710, 95 ALR 2d 1412; *Smith v. California,* 361 U. S. 147, 150, 4 L. ed. 2d 205, 209, 80 S. Ct. 215.

entirely on the basis of its appeal to prurient interests[17] strengthens the conclusion that the transactions here were sales of illicit merchandise, not sales of constitutionally protected matter.[18] A conviction for mailing obscene publications, but explained in part by the presence of this element, does not necessarily suppress the materials in question, nor chill their proper distribution for a proper use. Nor should it inhibit the enterprise of others seeking through serious endeavor to advance human knowledge or understanding in science, literature, or art. All that will have been determined is that questionable publications are obscene in a context which brands them as obscene as that term is defined in Roth—a use inconsistent with any claim to the shelter of the First Amendment.[19] "The nature of

17. See *Valentine v. Chrestensen,* 316 U. S. 52, 86 L. ed. 1262, 62 S. Ct. 920, where the Court viewed handbills purporting to contain protected expression as merely commercial advertising. Compare that decision with *Jamison v. Texas,* 318 U. S. 413, 87 L. ed. 869, 63 S. Ct. 669, and *Murdock v. Pennsylvania,* 319 U. S. 105, 87 L. ed. 1292, 63 S. Ct. 870, 146 ALR 81, where speech having the characteristics of advertising was held to be an integral part of religious discussions and hence protected. Material sold solely to produce sexual arousal, like commercial advertising, does not escape regulation because it has been dressed up as speech, or in other contexts might be recognized as speech.

18. Compare *Breard v. Alexandria,* 341 U. S. 622, 95 L. ed. 1233, 71 S. Ct. 920, 35 ALR 2d 335, with *Martin v. Struthers,* 319 U. S. 141, 87 L. ed. 1313, 63 S. Ct. 862. Cf. *Kovacs v. Cooper,* 336 U. S. 77, 93 L. ed. 513, 69 S. Ct. 448, 10 ALR 2d 608; *Giboney v. Empire Storage Co.,* 336 U. S. 490, 93 L. ed. 834, 69 S. Ct. 684; *Cox v. Louisiana,* 379 U. S. 536, 559, 13 L. ed. 2d 471, 487, 85 S. Ct. 453, 476.

19. One who advertises and sells a work on the basis of its prurient appeal is not threatened by the perhaps inherent residual vagueness of the Roth test, *cf. Dombrowski v. Pfister,* 380 U. S. 479, 486-487, 491-492, 14 L. ed. 2d 22, 28, 31, 85 S. Ct. 1116; such behavior is central to the objectives of criminal obscenity laws. ALI Model Penal Code, Tentative Draft No. 6 (May 6, 1957), pp. 1-3, 13-17; Comments to the Proposed Official Draft § 251.4, *supra*; Schwartz, Morals Offenses and the Model Penal Code, 63 Col. L. Rev. 669, 677-681 (1963); Paul & Schwartz, Federal Censorship—Obscenity in the Mail, 212-219 (1961); see *Mishkin v. New York,* 383 U. S. 502, at 507, note 5, 16 L. ed. 2d 56, at 61, 86 S. Ct. 958.

the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." *Roth v. United States*, 354 U. S. at 495, 1 L. ed. 2d at 1513. (Warren, C. J., concurring.)

It is important to stress that this analysis simply elaborates the test by which the obscenity vel non of the material must be judged. Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation.

Petitioners raise several procedural objections, principally directed to the findings which accompanied the trial court's memorandum opinion, Fed. Rules Crim. Proc. 23. Even on the assumption that petitioners' objections are well taken, we perceive no error affecting their substantial rights.

Affirmed.

SEPARATE OPINIONS.

Mr. Justice **Black**, dissenting.

Only one stark fact emerges with clarity out of the confusing welter of opinions and thousands of words written in this and two other cases today.[1] That fact is that Ginzburg, petitioner here, is now finally and authoritatively condemned to serve five years in prison for distributing printed matter about sex which neither Ginzburg nor anyone else could possibly have known to be criminal. Since,

1. See No. 49, *Mishkin v. New York*, 383 U. S. 502, 16 L. ed. 2d 56, 86 S. Ct. 958, and No. 368, *Memoirs v. Massachusetts*, 383 U. S. 413, 16 L. ed. 2d 1, 86 S. Ct. 975.

as I have said many times, I believe the Federal Government is without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind (as distinguished from conduct), I agree with Part II of the dissent of my Brother Douglas in this case, and I would reverse Ginzburg's conviction on this ground alone. Even assuming, however, that the Court is correct in holding today that Congress does have power to clamp official censorship on some subjects selected by the Court, in some ways approved by it, I believe that the federal obscenity statute as enacted by Congress and as enforced by the Court against Ginzburg in this case should be held invalid on two other grounds.

I.

Criminal punishment by government, although universally recognized as a necessity in limited areas of conduct, is an exercise of one of government's most awesome and dangerous powers. Consequently, wise and good governments make all possible efforts to hedge this dangerous power by restricting it within easily identifiable boundaries. Experience, and wisdom flowing out of that experience, long ago led to the belief that agents of government should not be vested with power and discretion to define and punish as criminal past conduct which had not been clearly defined as a crime in advance. To this end, at least in part, written laws came into being, marking the boundaries of conduct for which public agents could thereafter impose punishment upon people. In contrast, bad governments either wrote no general rules of conduct at all, leaving that highly important task to the unbridled discretion of government agents at the moment of trial, or sometimes, history tells us, wrote their laws in an unknown tongue so that people could not understand them or else placed their written laws at such inaccessible spots that people could not read them. It seems

to me that these harsh expedients used by bad governments to punish people for conduct not previously clearly marked as criminal are being used here to put Mr. Ginzburg in prison for five years.

I agree with my Brother Harlan that the Court has in effect rewritten the federal obscenity statute and thereby imposed on Ginzburg standards and criteria that Congress never thought about; or if it did think about them, certainly it did not adopt them. Consequently, Ginzburg is, as I see it, having his conviction and sentence affirmed upon the basis of a statute amended by this Court for violation of which amended statute he was not charged in the courts below. Such an affirmance we have said violates due process. *Cole v. Arkansas*, 333 U. S. 196, 92 L. ed. 644, 68 S. Ct. 514. Compare *Shuttlesworth v. Birmingham*, 382 U. S. 87, 15 L. ed. 2d 176, 86 S. Ct. 211. Quite apart from this vice in the affirmance, however, I think that the criteria declared by a majority of the Court today as guidelines for a court or jury to determine whether Ginzburg or anyone else can be punished as a common criminal for publishing or circulating obscene material are so vague and meaningless that they practically leave the fate of a person charged with violating censorship statutes to the unbridled discretion, whim and caprice of the judge or jury which tries him. I shall separately discuss the three elements which a majority of the Court seems to consider material in proving obscenity.[2]

2. As I understand all of the opinions in this case and the two related cases decided today, three things must be proven to establish material as obscene. In brief these are (1) the material must appeal to the prurient interests, (2) it must be patently offensive, and (3) it must have no redeeming social value. Mr. Justice Brennan in his opinion in *Memoirs v. Massachusetts*, 383 U. S. 413, 16 L. ed. 2d 1, 86 S. Ct. 975, which is joined by the Chief Justice and Mr. Justice Fortas, is of the opinion that all three of these elements must coalesce before material can be labeled obscene. Mr. Justice Clark in a dissenting opinion in Memoirs indicates, however, that proof of the first two elements alone is enough to show obscenity and that proof of the third—the material must be utterly without redeeming social value—

(a) The first element considered necessary for determining obscenity is that the dominant theme of the material taken as a whole must appeal to the prurient interest in sex. It seems quite apparent to me that human beings, serving either as judges or jurors, could not be expected to give any sort of decision on this element which would even remotely promise any kind of uniformity in the enforcement of this law. What conclusion an individual, be he judge or juror, would reach about whether the material appeals to "prurient interest in sex" would depend largely in the long run not upon testimony of witnesses such as can be given in ordinary criminal cases where conduct is under scrutiny, but would depend to a large extent upon the judge's or puror's personality, habits, inclinations, attitudes and other individual characteristics. In one community or in one courthouse a matter would be condemned as obscene under this so-called criterion but in another community, maybe only a few miles away, or in another courthouse in the same community, the material could be given a clean bill of health. In the final analysis the submission of such an issue as this to a judge or jury amounts to practically nothing more than a request for the judge or juror to assert his own personal beliefs about whether the matter should be allowed to be legally distributed. Upon this subjective determination the law becomes certain for the first and last time.

(b) The second element for determining obscenity as it is described by my Brother Brennan is that the material must be "patently offensive because it affronts contemporary community standards relating to the description or

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2 (cont'd)

is only an aid in proving the first two. In his dissenting opinion in Memoirs Mr. Justice White states that material is obscene "if its predominant theme appeals to the prurient interest in a manner exceeding customary limits of candor." In the same opinion Mr. Justice White states that the social importance test "is relevant only to determining the predominant prurient interest of the material."

representations of sexual matters . . . ." Nothing that I see in any position adopted by a majority of the Court today and nothing that has been said in previous opinions for the Court leaves me with any kind of certainty as to whether the "community standards"[3] referred to are world-wide, nation-wide, section-wide, state-wide, country-wide, precinct-wide or township-wide. But even if some definite areas were mentioned, who is capable of assessing "community standards" on such a subject? Could one expect the same application of standards by jurors in Mississippi as in New York City, in Vermont as in California? So here again the guilt or innocence of a defendant charged with obscenity must depend in the final analysis upon the personal judgment and attitudes of particular individuals and the place where the trial is held. And one must remember that the Federal Government has the power to try a man for mailing obscene matter in a court 3,000 miles from his home.

(c) A third element which three of my Brethren think is required to establish obscenity is that the material must be "utterly without redeeming social value." This element seems to me to be as uncertain, if not even more uncertain, than is the unknown substance of the Milky Way. If we are to have a free society as contemplated by the Bill of Rights, then I can find little defense for leaving the liberty of American individuals subject to the judgment of a judge or jury as to whether material that provokes thought or stimulates desire is "utterly without redeeming social value . . . ." Whether a particular treatment of a particular subject is with or without social value in this evolving, dynamic society of ours is a question upon which no uniform agreement could possibly be reached among politicians, statesmen, pro-

3. See the opinion of Mr. Justice Brennan, concurred in by Mr. Justice Goldberg in *Jacobellis v. Ohio*, 378 U. S. 184, 12 L. ed. 2d 793, 84 S. Ct. 1676, but compare the dissent in that case of The Chief Justice, joined by Mr. Justice Clark, at 199, 12 L. ed. 2d at 804.

fessors, philosophers, scientists, religious groups or any other type of group. A case-by-case assessment of social values by individual judges and jurors is, I think, a dangerous technique for government to utilize in determining whether a man stays in or out of the penitentiary.

My conclusion is that certainly after the fourteen separate opinions handed down in these three cases today no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of "obscenity" as that term is confused by the Court today. For this reason even if, as appears from the result of the three cases today, this country is far along the way to a censorship of the subjects about which the people can talk or write, we need not commit further constitutional transgressions by leaving people in the dark as to what literature or what words or what symbols if distributed through the mails make a man a criminal. As bad and obnoxious as I believe governmental censorship is in a Nation that has accepted the First Amendment as its basic ideal for freedom, I am compelled to say that censorship that would stamp certain books and literature as illegal in advance of publication or conviction would in some ways be preferable to the unpredictable book-by-book censorship into which we have now drifted.

I close this part of my dissent by saying once again that I think the First Amendment forbids any kind or type or nature of governmental censorship over views as distinguished from conduct.

II.

It is obvious that the effect of the Court's decisions in the three obscenity cases handled down today is to make it exceedingly dangerous for people to discuss either orally

or in writing anything about sex. Sex is a fact of life. Its pervasive influence is felt throughout the world and it cannot be ignored. Like all other facts of life it can lead to difficulty and trouble and sorrow and pain. But while it may lead to abuses, and has in many instances, no words need be spoken in order for people to know that the subject is one pleasantly interwoven in all human activities and involves the very substance of the creation of life itself. It is a subject which people are bound to consider and discuss whatever laws are passed by any government to try to suppress it. Though I do not suggest any way to solve the problems that may arise from sex or discussions about sex, of one thing I am confident, and that is that federal censorship is not the answer to these problems. I find it difficult to see how talk about sex can be placed under the kind of censorship the Court here approves without subjecting our society to more dangers than we can anticipate at the moment. It was to avoid exactly such dangers that the First Amendment was written and adopted. For myself I would follow the course which I believe is required by the First Amendment, that is, recognize that sex at least as much as any other aspect of life is so much a part of our society that its discussion should not be made a crime.

I would reverse this case.

Mr. Justice **Douglas**, dissenting.

Today's condemnation of the use of sex symbols to sell literature engrafts another exception on First Amendment rights that is as unwarranted as the judge-made exception concerning obscenity. This new exception condemns an advertising technique as old as history. The advertisements of our best magazines are chock-full of thighs, ankles, calves, bosoms, eyes, and hair, to draw the potential buyer's attention to lotions, tires, food, liquor, clothing, autos, and even

insurance policies. The sexy advertisement neither adds to nor detracts from the quality of the merchandise being offered for sale. And I do not see how it adds to or detracts one whit from the legality of the book being distributed. A book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it. I cannot imagine any promotional effort that would make chapters 7 and 8 of the Song of Solomon any the less or any more worthy of First Amendment protection than does their unostentatious inclusion in the average edition of the Bible.

I.

The Court has, in a variety of contexts, insisted that preservation of rights safeguarded by the First Amendment requires vigilance. We have recognized that a "criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms." *Dombrowski v. Pfister,* 380 U. S. 479, 486, 14 L. ed. 2d 22, 28, 85 S. Ct. 1116. Where uncertainty is the distinguishing characteristic of a legal principle—in this case the Court's "pandering" theory—"the free dissemination of ideas may be the loser." *Smith v. California,* 361 U. S. 147, 151, 4 L. ed. 2d 205, 210, 80 S. Ct. 215. The Court today, however, takes the other course, despite the admonition in *Speiser v. Randall,* 357 U. S. 513, 525, 2 L. ed. 2d 1460, 1472, 78 S. Ct. 1332, that "[t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools." Before today, due regard for the frailities of free expression led us to reject insensitive procedures[1] and clumsy, vague or

1. *Marcus v. Search Warrant,* 367 U. S. 717, 6 L. ed. 2d 1127, 81 S. Ct. 1708; *A Quantity of Books v. Kansas,* 378 U. S. 205, 12 L. ed. 2d 809, 84 S. Ct. 1723; *Freedman v. Maryland,* 380 U. S. 51, 13 L. ed. 2d 649, 85 S. Ct. 734.

overbroad substantive rules even in the realm of obscenity.[2] For as the Court emphasized in *Roth v. United States*, 354 U. S. 476, 488, 1 L. ed. 2d 1498, 1509, 77 S. Ct. 1304, "[t]he door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

Certainly without the aura of sex in the promotion of these publications their contents cannot be said to be "utterly without redeeming social importance." *Roth v. United States, supra*, 354 U. S. at 484, 1 L. ed. 2d at 1506.[3] One of the publications condemned today is the Housewife's Handbook on Selective Promiscuity, which a number of doctors and psychiatrists thought had clinical value. One clinical psychologist said: "I should like to recommend it, for example, to the people in my church to read, especially those who are having marital difficulties, in order to increase their tolerance and understanding for one another. Much of the book, I should think, would be very suitable reading for teen age people, especially teen age young women who could empathize strongly with the growing up period that Mr. Rey [Anthony] relates, and could read on and be disabused of some of the unrealistic notions about marriage and sexual

2. *Butler v. Michigan*, 352 U. S. 380, 1 L. ed. 2d 412, 77 S. Ct. 524; *Smith v. California*, 361 U. S. 147, 4 L. ed. 2d 205, 80 S. Ct. 215; *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 8 L. ed. 2d 639, 82 S. Ct. 1432 (opinion of Harlan, J.).

3. The Court's premise is that Ginzburg represented that his publications would be sexually arousing. The Court, however, recognized in Roth: "[S]ex and obscenity are not synonymous. Obscene material is material whch deals with sex in a manner appealing to *prurient* interest . . . i.e., a shameful or morbid interest in nudity, sex, or excretion . . . ." Id., 487 and note 20, 1 L. ed. 2d 1508 (emphasis added). The advertisements for these publications, which the majority quotes (ante, at 37, n. 9), promised candor in the treatment of matters pertaining to sex, and at the same time proclaimed that they were artistic or otherwise socially valuable. In effect, then, these advertisements represented that the publications are *not* obscene.

experiences. I should think this would make very good reading for the average man to help him gain a better appreciation of female sexuality."

The Rev. George Von Hilsheimer III, a Baptist minister,[4] testified that he has used the book "insistently in my pastoral counseling and in my formal psychological counseling":

> "The book is a history, a very unhappy history, of a series of sexual and psychological misadventures and the encounter of a quite typical and average American woman with quite typical and average American men. The fact that the book itself is the history of a woman who has had sexual adventures outside the normally accepted bounds of marriage which, of course for most Americans today, is a sort of serial polygamy, it does not teach or advocate this, but gives the women to whom I give the book at least a sense that their own experiences are not unusual, that their sexual failures are not unusual, and that they themselves should not be guilty because they are, what they say, sexual failures."

I would think the Baptist minister's evaluation would be enough to satisfy the Court's test, unless the censor's word is to be final or unless the experts are to be weighed in the censor's scales, in which event one Anthony Comstock would too often prove more weighty than a dozen more detached scholars, or unless we, the ultimate Board

4. Rev. Von Hilsheimer obtained an A. B. at the University of Miami in 1951. He did graduate work in psychology and studied analysis and training therapy. Thereafter, he did graduate work as a theological student, and received a degree as a Doctor of Divinity from the University of Chicago in 1957. He had extensive experience as a group counselor, lecturer, and family counselor. He was a consultant to President Kennedy's Study Group on National Voluntary Services, and a member of the board of directors of Mobilization for Youth.

of Censors, are to lay down standards for review that give the censor the benefit of the "any evidence" rule or the "substantial evidence" rule as in the administrative law field. *Cf. Universal Camera Corp. v. Labor Board,* 340 U. S. 474, 95 L. ed. 456, 71 S. Ct. 456. Or perhaps we mean to let the courts sift and choose among conflicting versions of the "redeeming social importance" of a particular book, making sure that they keep their findings clear of doubt lest we reverse, as we do today in *Memoirs v. Massachusetts,* 383 U. S. 413, 16 L. ed. 2d 1, 86 S. Ct. 975, because the lower court in an effort to be fair showed how two-sided the argument was. Since the test is whether the publication is "utterly without redeeming social importance," then I think we should honor the opinion of the Baptist minister who testified as an expert in the field of counseling.

Then there is the newsletter Liaison. One of the defendants' own witnesses, critic Dwight Macdonald, testified that while, in his opinion, it did not go beyond the customary limits of candor tolerated by the community, it was "an extremely tasteless, vulgar and repulsive issue." This may, perhaps overstate the case, but Liaison is admittedly little more than a collection of "dirty" jokes and poems, with the possible exception of an interview with Dr. Albert Ellis. As to this material, I find wisdom in the words of the late Judge Jerome Frank:

> "Those whose views most judges know best are other lawyers. Judges can and should take judicial notice that, at many gatherings of lawyers at Bar Association or of alumni of our leading law schools, tales are told fully as 'obscene' as many of those distributed by men . . . convicted for violation of the obscenity statute. . . . 'One thinks of the lyrics sung . . . by a certain respected and conservative member of the faculty of a great law-school which considers

itself the most distinguished and which is the Alma Mater of many judges sitting on upper courts.' "[5]

Liaison's appeal is neither literary nor spiritual. But neither is its appeal to a "shameful or morbid interest in nudity, sex, or excretion." The appeal is to the ribald sense of humor which is—for better or worse—a part of our culture. A mature society would not suppress this newsletter as obscene but would simply ignore it.

Then there is EROS. The Court affirms the judgment of the lower court, which found only four of the many articles and essays to be obscene. One of the four articles consisted of numerous ribald limericks, to which the views expressed as to Liaison would apply with equal force. Another was a photo essay entitled "Black and White in Color" which dealt with interracial love: a subject undoubtedly offensive to some members of our society. Critic Dwight Macdonald testified:

> "I suppose if you object to the idea of a Negro and a white person having sex together, then, of course, you would be horrified by it. I don't. From the artistic point of view I thought it was very good. In fact, I thought it was done with great taste, and I don't know how to say it—I never heard of him before, but he is obviously an extremely competent and accomplished photographer."

Another defense witness, Professor Horst W. Janson, presently the Chairman of the Fine Arts Department at New York University, testified:

> "I think they are outstandingly beautiful and artistic photographs. I can not imagine the theme being

5. *United States v. Roth*, 237 F. 2d 796, 822 and n. 58 (concurring opinion).

treated in a more lyrical and delicate manner than it has been done here.

. . .

"I might add here that of course photography in appropriate hands is an artistic instrument and this particular photographer has shown a very great awareness of compositional devices and patterns that have a long and well-established history in western art.

. . .

"The very contrast in the color of the two bodies of course has presented him with certain opportunities that he would not have had with two models of the same color, and he has taken rather extraordinary and very delicate advantage of these contrasts."

The third article found specifically by the trial judge to be obscene was a discussion by Drs. Eberhard W. and Phyllis C. Kronhausen of erotic writing by women, with illustrative quotations.[6] The worth of the article was discussed by Dwight Macdonald, who stated:

"I thought [this was] an extremely interesting and important study with some remarkable quotations from the woman who had put down her sense of love-making, of sexual intercourse . . . in an extremely eloquent way. I have never seen this from the woman's point of view. I thought the point they made, the difference between the man's and the woman's approach to sexual intercourse was very well made and very important."

Still another article found obscene was a short introduction to and lengthy excerpt from My Life and

6. The Kronhausens wrote Pornography and the Law (1959).

> Loves by Frank Harris, about which there is little in the record. Suffice to say that this seems to be a book of some literary stature. At least I find it difficult on this record to say that it is "utterly without redeeming social importance."[7]

Some of the tracts for which these publishers go to prison concern normal sex, some homosexuality, some the masochistic yearning that is probably present in everyone and dominant in some. Masochism is a desire to be punished or subdued. In the broad frame of reference the desire may be expressed in the longing to be whipped and lashed, bound and gagged, and cruelly treated.[8] Why is it unlawful to cater to the needs of this group? They are, to be sure, somewhat offbeat, nonconformist, and odd. But we are not in the realm of criminal conduct, only ideas and tastes. Some like Chopin, others like "rock and roll." Some are "normal," some are masochistic, some deviant in other respects, such as the homosexual. Another group also represented here translates mundane articles into sexual symbols. This group, like those embracing masochism, are anathema to the so-called stable majority. But why is freedom of the press and expression denied them? Are they to be barred from communicating in symbolisms important to them? When the Court today speaks of

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7. The extensive literary comment which the book's publication generated demonstrates that it is not "utterly with out redeeming social importance." See, e.g., New York Review of Books, p. 6 (Jan. 9, 1964); New Yorker, pp. 79-80 (Jan. 4, 1964); Library Journal, pp. 4743-4744 (Dec. 15, 1963); New York Times Book Review, p. 10 (Nov. 10, 1963); Time, pp. 102-104 (Nov. 8, 1963); Newsweek, pp. 98-100 (Oct. 28, 1963); New Republic, pp. 23-27 (Dec. 28, 1963).

8. See Krafft-Ebing, Psychopathia Sexualis, p. 89 et seq. (1893); Eisler, Man Into Wolf, p. 23 et seq. (1951); Stekel Sadism and Masochism (1929) passim; Bergler, Principles of Self-Damage (1959) passim; Reik, Masochism in Modern Man (1941) passim.

"social value," does it mean a "value" to the majority? Why is not a minority "value" cognizable? The masochistic group is one; the deviant group is another. Is it not important that members of those groups communicate with each other? Why is communication by the "written word" forbidden? If we were wise enough, we might know that communication may have greater therapeutical value than any sermon that those of the "normal" community can ever offer. But if the communication is of value to the masochistic community or to others of the deviant community, how can it be said to be "utterly without redeeming social importance"? "Redeeming" to whom? "Importance" to whom?

We took quite a different stance in *One, Inc. v. Olesen,* 355 U. S. 371, 2 L. ed. 352, 78 S. Ct. 364, where we unanimously reversed the decision of the Court of Appeals in 241 F. 2d 772 without opinion. Our holding was accurately described by Lockhart and McClure, Obscenity Censorship: The Core Constitutional Issue—What Is Obscene? 7 Utah L. Rev. 289, 293 (1961):

> "[This] was a magazine for homosexuals entitled One—The Homosexual Magazine, which was definitely not a scientific or critical magazine, but appears to have been written to appeal to the tastes and interests of homosexuals."[9]

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9. The Court of Appeals summarized the contents as follows:

"The article 'Sappho Remembered' is the story of a lesbian's influence on a young girl only twenty years of age but 'actually nearer sixteen in many essential ways of maturity,' in her struggle to choose between a life with the lesbian, or a normal married life with her childhood sweetheart. The lesbian's affair with her roommate while in college, resulting in the lesbian's expulsion from college, is recounted to bring in the jealousy angle. The climax is reached when the young girl gives up her chance for a normal married life to live with the lesbian. This article is nothing more than cheap pornography calculated to promote lesbianism. It falls far short of dealing with homosexuality from the scientific, historical and critical point of view.

Man was not made in a fixed mould. If a publication caters to the idiosyncrasies of a minority, why does it not have some "social importance"? Each of us is a very temporary transient with likes and dislikes that cover the spectrum. However plebian my tastes may be, who am I to say that others' tastes must be so limited and that other tastes have no "social importance"? How can we know enough to probe the mysteries of the subconscious of our people and say that this is good for them and that is not? Catering to the most eccentric taste may have "social importance" in giving that minority an opportunity to express itself rather than to repress its inner desires, as I suggest in my separate opinion in *Memoirs v. Massachusetts,* 383 U. S. at 431, 432, 16 L. ed. 2d at 13. How can we know that this expression may not *prevent* antisocial conduct?

I find it difficult to say that a publication has no "social importance" because it caters to the taste of the most un-

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9 (cont'd)

"The poem 'Lord Samuel and Lord Montague' is about the alleged homosexual activities of Lord Montague and other British Peers and contains a warning to all males to avoid the public toilets while Lord Samuel is 'sniffing round the drains' of Piccadilly (London). . . .

. . .

"The stories 'All This and Heaven Too,' and 'Not Til the End,' pages 32-36, are similar to the story 'Sappho Remembered,' except that they relate to the activities of the homosexuals rather than lesbians." 241 F. 2d 772, 777, 778.

There are other decisions of ours which also reversed judgments condemning publications catering to a wider range of literary tastes than we seem to tolerate today. See, e.g., *Mounce v. United States,* 355 U. S. 180, 2 L. ed. 2d 187, 78 S. Ct. 267, vacating and remanding 247 F. 2d 148 (nudist magazines); *Sunshine Book Co. v. Summerfield,* 355 U. S. 372, 2 L. ed. 2d 352, 78 S. Ct. 365, reversing 101 App. DC 358, 249 F. 2d 114 (nudist magazine); *Tralins v. Gerstein,* 378 U. S. 576, 12 L. ed. 2d 1033, 84 S. Ct. 1903, reversing 151 So. 2d 19 (book titled "Pleasure Was My Business" depicting the happenings in a house of prostitution); *Grove Press v. Gerstein,* 378 U. S. 577, 12 L. ed. 2d 1035, 84 S. Ct. 1909, reversing 156 So. 2d 537 (book titled "Tropic of Cancer" by Henry Miller).

orthodox amongst us. We members of this Court should be among the last to say what should be orthodox in literature. An omniscience would be required which few in our whole society possess.

II.

This leads me to the conclusion, previously noted, that the First Amendment allows all ideas to be expressed—whether orthodox, popular, offbeat, or repulsive. I do not think it permissible to draw lines between the "good" and the "bad" and be true to the constitutional mandate to let all ideas alone. If our Constitution permitted "reasonable" regulation of freedom of expression, as do the constitutions of some nations,[10] we would be in a field where the legislative and the judiciary would have much leeway. But under our charter all regulation or control of expression is barred. Government does not sit to reveal where the "truth" is. People are left to pick and choose between competing offerings. There is no compulsion to take and read what is repulsive any more than there is to spend one's time poring over government bulletins, political tracts, or theological treatises. The theory is that people are mature enough to pick and choose, to recognize trash when they see it, to be attracted to the literature that satisfies their deepest need, and, hopefully, to move from plateau to plateau and finally reach the world of enduring ideas.

10. See, e.g., Constitution of the Union of Burma, Art. 17(i), reprinted in I Peaslee, Constitutions of Nations, p. 281 (2d ed. 1956); Constitution of India, Art. 19(2), II Peaslee, op. cit. *supra*, at p. 227; Constitution of Ireland, Art. 40(6)(1)(i), II Peaslee, op. cit. *supra*, at p. 458; Federal Constitution of the Swiss Confederation, Art. 55, III Peaslee, op. cit. *supra*, at p. 344; Constitution of Libya, Art. 22, I Peaslee, Constitutions of Nations, p. 438 (3d ed. 1965); Constitution of Nigeria, Art. 25(2), I Peaslee, op. cit. *supra*, at p. 605, Constitution of Zambia, Art. 22(2), I Peaslee, op. cit. *supra*, at pp. 1040-1041.

I think this is the ideal of the Free Society written into our Constitution. We have no business acting as censors or endowing any group with censorship powers. It is shocking to me for us to send to prison anyone for publishing anything, especially tracts so distant from any incitement to action as the ones before us.

Mr. Justice **Harlan**, dissenting.

I would reverse the convictions of Ginzburg and his three corporate co-defendants. The federal obscenity statute under which they were convicted, 18 U. S. C. § 1461 (1964 ed.), is concerned with unlawful shipment of "nonmailable" matter. In my opinion announcing the judgment of the Court in *Manual Enterprises, Inc. v. Day,* 370 U. S. 478, 8 L. ed. 2d 639, 82 S. Ct. 1432, the background of the statute was assessed, and its focus was seen to be solely on the character of the material in question. That too has been the premise on which past cases in this Court arising under this statute, or its predecessors, have been decided. See, *e. g., Roth v. United States,* 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304. I believe that under this statute the Federal Government is constitutionally restricted to banning from the mails only "hard-core pornography," see my separate opinion in *Roth, supra,* 354 U. S. at 507, 1 L. ed. 2d 1519, and my dissenting opinion in A Book Named *"John Cleland's Memoirs" v. Attorney General of Massachusetts,* 383 U. S. 455, 16 L. ed. 2d 26. Because I do not think it can be maintained that the material in question here falls within that narrow class, I do not believe it can be excluded from the mails.

The Court recognizes the difficulty of justifying these convictions; the majority refuses to approve the trial judge's "exegesis of Roth" (note 3, ante, p. 35); it declines to approve the trial court's "characterizations" of the

Handbook "outside" the "setting" which the majority for the first time announces to be crucial to this conviction (note 5, ante, p. 35). Moreover, the Court accepts the Government's concession that the Handbook has a certain "worth" when seen in something labeled a "controlled, or even a neutral, environment" (ante, p. 39); the majority notes that these are "publications which we have assumed . . . cannot themselves be adjudged obscene in the abstract" (ante, p. 40). In fact, the Court in the last analysis sustains the convictions on the express assumption that the items held to be obscene are not, viewing them strictly, obscene at all (ante, p. 35).

This curious result is reached through the elaboration of a theory of obscenity entirely unrelated to the language, purposes, or history of the federal statute now being applied, and certainly different from the test used by the trial court to convict the defendants. While the precise holding of the Court is obscure, I take it that the objective test of Roth, which ultimately focuses on the material in question, is to be supplemented by another test that goes to the question whether the mailer's aim is to "pander" to or "titillate" those to whom he mails questionable matter.

Although it is not clear whether the majority views the panderer test as a statutory gloss or as constitutional doctrine, I read the opinion to be in the latter category.[1] The First Amendment, in the obscenity area, no longer fully protects material on its face nonobscene, for such material must now also be examined in the light of the defendant's conduct, attitude, motives. This seems to me a mere euphemism for allowing punishment of a person who mails otherwise constitutionally protected material just because a jury or a judge may not find him or his business agreeable.

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1. The prevailing opinion in *Memoirs v. Massachusetts,* 383 U. S. 413, 16 L. ed. 2d 1, 86 S. Ct. 975, makes clearer the constitutional ramifications of this new doctrine.

Were a State to enact a "panderer" statute under its police power, I have little doubt that—subject to clear drafting to avoid attacks on vagueness and equal protection grounds—such a statute would be constitutional. Possibly the same might be true of the Federal Government acting under its postal or commerce powers. What I fear the Court has done today is in effect to write a new statute, but without the sharply focused definitions and standards necessary in such a sensitive area. Casting such a dubious gloss over a straightforward 101-year-old statute (see 13 Stat. 507) is for me an astonishing piece of judicial improvisation.

It seems perfectly clear that the theory on which these convictions are now sustained is quite different from the basis on which the case was tried and decided by the District Court and affirmed by the Court of Appeals.[2] The District Court found the Handbook "patently offensive on its face" and without "the slightest redeeming social, artistic or literary importance or value": it held that there was "no credible evidence that The Handbook has the slightest valid scientific importance for treatment of individuals in clinical psychiatry, psychology, or any field of medicine." 224 F. Supp. 129, 131. The trial court made similar findings as to Eros and Liaison. The majority's opinion, as I read it, casts doubts upon these explicit findings. As to the Handbook, the Court interprets an offhand remark by the government prosecutor at the sentencing hearing as a "concession," which the majority accepts, that the prosecution rested upon the conduct of the petitioner, and the Court explicitly refuses to accept the trial judge's "characterizations" of the book, which I take to be an implied rejection

2. Although at one point in its opinion the Court of Appeals referred to "the shoddy business of pandering," 338 F. 2d 12, 15, a reading of the opinion as a whole plainly indicates that the Court of Appeals did not affirm these convictions on the basis on which this Court now sustains them.

of the findings of fact upon which the conviction was in fact based (note 5, ante, p. 35). Similarly as to Eros, the Court implied that the finding of obscenity might be "erroneous" were it not supported "by the evidence of pandering" (ante, p. 38). The Court further characterizes the Eros decision, aside from pandering, as "an otherwise debatable conclusion" (ante, p. 38).

If there is anything to this new pandering dimension to the mailing statute, the Court should return the case for a new trial, for petitioners are at least entitled to a day in court on the question on which their guilt has ultimately come to depend. Compare the action of the Court in *Memoirs v. Massachusetts*, 383 U. S. 413, 16 L. ed. 2d 1, 86 S. Ct. 975, where the Court affords the State an opportunity to prove in a subsequent prosecution that an accused purveyor of Fanny Hill in fact used pandering methods to secure distribution of the book.

If a new trial were given in the present case, as I read the Court's opinion, the burden would be on the Government to show that the motives of the defendants were to pander to "the widespread weakness for titillation by pornography" (ante, p. 38). I suppose that an analysis of the type of individuals receiving Eros and the Handbook would be relevant. If they were ordinary people, interested in purchasing Eros or the Handbook for one of a dozen personal reasons, this might be some evidence of pandering to the general public. On the other hand, as the Court suggests, the defendants could exonerate themselves by showing that they sent these works only or perhaps primarily (no standards are set) to psychiatrists and other serious-minded professional people. Also relevant would apparently be the nature of the mailer's advertisements or representations. Conceivably someone mailing to the public selective portions of a recognized classic with the avowed purpose of titillation would run the risk of conviction for

mailing nonmailable matter. Presumably the Post Office under this theory might once again attempt to ban Lady Chatterley's Lover, which a lower court found not bannable in 1960 by an abstract application of Roth. *Grove Press, Inc. v. Christenberry,* 276 F. 2d 433. I would suppose that if the Government could show that Grove Press is pandering to people who are interested in the book's sexual passages and not in D. H. Lawrence's social theories or literary technique § 1461 could properly be invoked. Even the well-known opinions of Judge A. N. Hand in *United States v. One Book Entitled Ulysses,* 72 F. 2d 705, and of Judge Woolsey in the District Court, 5 F. Supp. 182, might be rendered nugatory if a mailer of Ulysses is found to be titillating readers with its "coarse, blasphemous, and obscene" portions, 72 F. 2d, at 707, rather than piloting them through the intricacies of Joyce's stream of consciousness.

In the past, as in the trial of these petitioners, evidence as to a defendant's conduct was admissible only to show relevant intent.[3] Now evidence not only as to conduct, but also as to attitude and motive, is admissible on the primary question of whether the material mailed is obscene. I have difficulty seeing how these inquiries are logically related to the question whether a particular work is obscene. In addition, I think such a test for obscenity is impermissibly

3. To show pandering, the Court relies heavily on the fact that the defendants sought mailing privileges from the postmasters of Intercourse and Blue Ball, Pennsylvania, before settling upon Middlesex, New Jersey, as a mailing point (ante, pp. 36-37). This evidence was admitted, however, only to show required scienter, see 338 F. 2d 12, 16. On appeal to the Court of Appeals and to this Court, petitioner Ginzburg asserted that at most the evidence shows the intent of petitioner Eros Magazine, Inc., and was erroneously used against him. The Court of Appeals held the point de minimis, 338 F. 2d, at 16-17, on the ground that the parties had stipulated the necessary intent. The United States, in its brief in this Court, likewise viewed this evidence as relating solely to scienter; nowhere did the United States attempt to sustain these convictions on anything like a pandering theory.

vague, and unwarranted by anything in the First Amendment or in 18 U. S. C. § 1461.

I would reverse the judgment below.

Mr. Justice **Stewart**, dissenting.

Ralph Ginzburg has been sentenced to five years in prison for sending through the mail copies of a magazine, a pamphlet, and a book. There was testimony at his trial that these publications possess artistic and social merit. Personally, I have a hard time discerning any. Most of the material strikes me as both vulgar and unedifying. But if the First Amendment means anything, it means that a man cannot be sent to prison merely for distributing publications which offend a judge's esthetic sensibilities, mine or any other's.

Censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime. Long ago those who wrote our First Amendment charted a different course. They believed a society can be truly strong only when it is truly free. In the realm of expression they put their faith, for better or for worse, in the enlightened choice of the people, free from the interference of a policeman's instrusive thumb or a judge's heavy hand. So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance. A book worthless to me may convey something of value to my neighbor. In the free society to which our Constitution has committed us, it is for each to choose for himself.[1]

1. Different constitutional questions would arise in a case involving an assault upon individual privacy by publication in a manner so blatant or obstrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it. Cf. e.g., *Breard v. Alexandria,* 341 U. S. 622, 95 L. ed. 1233, 71 S. Ct. 920, 35 ALR 2d 335; *Public Utilities Commission of the District of Columbia v. Pollack,* 343 U. S. 451, 96 L. ed. 1068, 72 S. Ct. 813; *Griswold v. Connecticut,* 381 U. S. 479, 14 L. ed. 2d 510, 85 S. Ct. 1678. Still

Because such is the mandate of our Constitution, there is room for only the most restricted view of this Court's decision in *Roth v. United States,* 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304. In that case the Court held that "obscenity is not within the area of constitutionally protected speech or press." Id., at 485, 1 L. ed. 2d at 1507. The Court there characterized obscenity as that which is "utterly without redeeming social importance," id., at 484, 1 L. ed. 2d at 1507, "deals with sex in a manner appealing to prurient interest," id., at 487, 1 L. ed. 2d at 1508, and "goes substantially beyond customary limits of candor in description or representation of such matters." Id., at 487, note 20, 1 L. ed. 2d at 1508.[2] In *Manual Enterprises v. Day,* 370 U. S. 478, 8 L. ed. 2d 639, 82 S. Ct. 1432, I joined Mr. Justice Harlan's opinion adding "patent indecency" as a further essential element of that which is not constitutionally protected.

There does exist a distinct and easily identifiable class of material in which all of these elements coalesce. It is that, and that alone, which I think government may constitutionally suppress, whether by criminal or civil sanctions. I have referred to such material before as hard-core pornography, without trying further to define it. *Jacobellis v. Ohio,* 378, U. S. 184, at 197, 12 L. ed. 2d 793, at 803, 84 S. Ct. 1676 (concurring opinion). In order to prevent any possible misunderstanding, I have set out in the margin a description, borrowed from the Solicitor General's brief,

other considerations might come into play with respect to laws limited in their effect to those deemed insufficiently adult to make an informed choice. No such issues were tendered in this case.

2. It is not accurate to say that the Roth opinion "fashioned standards" for obscenity, because, as the Court explicitly stated, no issue was there presented as to the obscenity of the material involved. 354 U. S. at 481, note 8, 1 L. ed. 2d at 1505. And in no subsequent case has a majority of the Court been able to agree on any such "standards."

of the kind of thing to which I have reference.[3] See also Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 63-64.

Although arguments can be made to the contrary, I accept the proposition that the general dissemination of matter of this description may be suppressed under valid laws.[4] That has long been the almost universal judgment of our society. See *Roth v. United States,* 354 U. S., at 485, 1 L. ed. 2d at 1507. But material of this sort is wholly different from the publications mailed by Ginzburg in the present case, and different not in degree but in kind.

The Court today appears to concede that the materials Ginzburg mailed were themselves protected by the First Amendment. But, the Court says, Ginzburg can still be sentenced to five years in prison for mailing them. Why? Because, says the Court, he was guilty of "commercial exploitation," of "pandering," and of "titillation." But Ginzburg was not charged with "commercial exploitation"; he was not charged with "pandering"; he was not charged with "titillation." Therefore, to affirm his conviction now on any of those grounds, even if otherwise valid, is to deny

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3. ". . . Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. . . ."

4. During oral argument we were advised by government counsel that the vast majority of prosecutions under this statute involve material of this nature. Such prosecutions usually result in guilty pleas and never come to this Court.

him due process of law. *Cole v. Arkansas,* 333 U. S. 196, 92 L. ed. 644, 68 S. Ct. 514. But those grounds are *not,* of course, otherwise valid. Neither the statute under which Ginzburg was convicted nor any other federal statute I know of makes "commercial exploitation" or "pandering" or "titillation" a criminal offense. And any criminal law that sought to do so in the terms so elusively defined by the Court would, of course, be unconstitutionally vague and therefore void. All of these matters are developed in the dissenting opinions of my Brethren, and I simply note here that I fully agree with them.

For me, however, there is another aspect of the Court's opinion in this case that is even more regrettable. Today the Court assumes the power to deny Ralph Ginzburg the protection of the First Amendment because it disapproves of his "sordid business." That is a power the Court does not possess. For the First Amendment protects us all with an even hand. It applies to Ralph Ginzburg with no less completeness and force than to G. P. Putnam's Sons.[5] In upholding and enforcing the Bill of Rights, this Court has no power to pick or to choose. When we lose sight of that fixed star of constitutional adjudication, we lose our way. For then we forsake a government of law and are left with government by Big Brother.

I dissent.

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5. See *Memoirs v. Massachusetts,* 383 U. S. 413, 16 L. ed. 2d 1, 86 S. Ct. 975.

SUPREME COURT OPINION DENYING REHEARING.

No. 42.

RALPH GINZBURG ET AL.,
Petitioners,

v.

UNITED STATES

384 U. S. 934, 16 L. ed. 2d 536, 86 S. Ct. 1440.

May 2, 1966. Motion of Ernest Angell et al., for leave to file a brief, as amici curiae, in support of petition for rehearing granted. Petition for rehearing denied.

Former Decision, 383 U. S. 463, 16 L. ed. 2d 31, 86 S. Ct. 942.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN CRIMINAL NO. 21367 DENYING PETITION.

AND Now, this fifth day ot July, 1966, the Court having carefully reviewed and considered the entire record in this matter, defendant's petition, the answer, and the excellent oral arguments by counsel on June 27, 1966, IT IS ORDERED that the Petition of Defendant, Ralph Ginzburg, for (a) Reconsideration of Sentence, and (b) Upon Reconsideration, for Vacation, Suspension or Reductions of Sentence, be and the same is hereby DENIED.

/s/ RALPH C. BODY,
Ralph C. Body, *J.*

UNITED STATES of America

v.

Ralph GINZBURG, Documentary Books, Inc., Eros Magazine, Inc., Liaison News Letter, Inc., Ralph Ginzburg, Appellant.

No. 16028.

UNITED STATES COURT OF APPEALS
Third Circuit.

Argued Sept. 13, 1966.

Decided March 12, 1967.

Reargued Nov. 28, 1967.

Decided July 3, 1968.

Harold E. Kohn, Dilworth, Paxson, Kalish, Kohn & Levy, Philadelphia, Pa., for appellant.

J. Shane Creamer, Asst. U. S. Atty., Philadelphia, Pa., for appellee.

OPINION ON REHEARING

Before STALEY, Chief Judge, and GERALD MCLAUGHLIN, KALODNER, HASTIE, FREEDMAN, SEITZ and VAN DUSEN, Circuit Judges.

KALODNER, Circuit Judge.

Did the District Court abuse its discretion in failing to accord a requested hearing to the appellant on his petition for reconsideration of sentence, (1) in the light of the reasons assigned by the Supreme Court of the United States for its affirmance of the judgment of conviction, and (2) the factual allegations of the petition for reconsideration relating thereto?

We are required, on this appeal, to decide this question only, and accordingly do not reach other contentions advanced by the appellant and the *amici curiae*.[1]

Discussion of the question stated must be prefaced by this statement of its factual background:

In June 1963, the District Court, to whom the case was tried without a jury, found the appellant Ralph Ginzburg, and three corporations which he controlled, guilty upon 28 counts of an Indictment charging violation of the federal obscenity statute, 18 U. S. C. A. § 1461.[2] Counts 1 through 10 of the Indictment charged Ginzburg, and the particular corporate defendant named therein, with using the mails for the delivery of "non-mailable matter", consisting of promotional advertising literature, informing how and where a designated alleged obscene publication could be obtained. Counts 11 through 28, charged Ginzburg, and the particular corporate defendant named therein, with using the mails for

1. The American Civil Liberties Union, Greater Philadelphia Branch; and Ernest Angell, Jefferson B. Fordham, Irwin Karp, Horace S. Manges, Harriet Pilpel, Dean Louis H. Pollak, Whitney North Seymour, Harrison Tweed and Bethuel M. Webster.

2. The Federal Obscenity Statute provides in pertinent part:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

* * *

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters * * * may be obtained * * *.

* * *

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense * * *."

the delivery of a designated "non-mailable" obscene publication. The publications concerned were "The Housewife's Handbook on Selective Promiscuity" ("Handbook"); "Eros", a magazine, and "Liaison", a biweekly newsletter.

Following the District Court's denial of the defendants' motions for Arrest of Judgment and, in the alternative, for a new trial, 224 F. Supp. 129 (E. D. Pa. 1963), and its subsequent imposition of a 5-year prison sentence and $28,000 fine as to Ginzburg, and fines aggregating $14,000 imposed on the corporate defendants, the defendants appealed. We affirmed at 338 F. 2d 12 (3 Cir. 1964), and the Supreme Court of the United States did likewise at 383 U. S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31 (1966), rehearing denied, 384 U. S. 934, 86 S. Ct. 1440, 16 L. Ed. 2d 536.

Ginzburg, thereafter, filed a petition for reconsideration of sentence in the District Court in which he prayed for (1) vacation, suspension or reduction of his sentence of imprisonment, and (2) a hearing at which he could present evidence in support of the petition. The Government, in its "Response" to the petition, did not deny any of its factual averments, and with respect to the petitioner's request for a hearing stated "it would seem appropriate that an opportunity to be heard be afforded", and "[a]ccordingly, the Government does not oppose the defendant's request for a hearing on the merits of his petition". The Government, in its Response, further stated that "it takes no position on that part of the defendant's motion which pertains to reduction of his sentence", and "[i]nsofar as defendant's motion papers request this Court to vacate or suspend his sentence, the Government respectfully urges this Court to deny the petition".

The District Court subsequently, without hearing, entered an Order denying the petition, and Ginzburg appealed. We affirmed, by a divided court, and thereafter granted rehearing by the court *en banc*.

What has been said brings us to the petition for reconsideration and the contentions with respect to it presented here.

Ginzburg's petition for reconsideration of sentence may be summarized as follows:

(1)The District Court found him guilty of violating the obscenity statute on its view that Handbook, Eros and Liaison were obscene *per se*, and its fact-findings that the "defendants" unsuccessfully sought Blue Ball, Pennsylvania and Intercourse, Pennsylvania, mailing addresses, and finally arranged the Middlesex, New Jersey mailing address, "in order that the postmarks on mailed material would further defendants' general scheme and purpose".

(2) The Supreme Court of the United States affirmed his conviction "because of the manner in which the publications had been advertised", and not on the ground that they were obscene *per se*, and "this basis for the Supreme Court's decision was new and unprecedented and a departure from pre-existing law, which had looked to the publications themselves in order to determine obscenity."

(3) Ginzburg had been advised by his trial counsel that the use of the mails for his publications "was lawful", and "[b]ecause of the state of the law as it existed prior to the Supreme Court's decision", his counsel did not consider the mail applications to the various post offices "to be material", and for that reason did not have Ginzburg testify to the fact that he "had absolutely no part whatsoever and no *mens rea* in those Post Office applications".

(4) Ginzburg is "a first offender"; he "always has been a law-abiding hard-working member of the community"; he supports his wife and three children, widowed

mother and blind sister; his [then] 12-year old daughter has been under psychiatric care since shortly after his sentencing and his imprisonment "will have a serious adverse effect on the child's mental health"; "he is a responsible and respected member of the publishing profession"; "[h]e does not intend to and will not republish or redistribute the material which led to his conviction or any material of the same sort"; and, finally, he will adduce testimony in support of his factual allegations at a hearing on his petition for reconsideration of sentence.

On this appeal, Ginzburg contends that the District Court abused its discretion (1) in denying him a hearing on his petition for reconsideration; (2) in "arbitrarily and without reason" refusing to change his sentence; and (3) in refusing to make available to him the contents of the pre-sentence report received by the District Court prior to the imposition of his sentence.

The Government, in reply, urges that the District Court did not abuse its discretion in denying a hearing on the reconsideration petition and in denying the petition on its merits; and, further, that the District Court did not, in refusing inspection of the pre-sentence report, abuse the limits of its permissible discretion under Rule 32(c) of the Federal Rules of Criminal Procedure, assuming the rule to be applicable to a reconsideration of sentence proceeding.

As earlier stated, we will limit our present disposition to the single question as to whether the District Court abused its discretion in failing to accord the requested hearing to Ginzburg on his petition for reconsideration of sentence in the light of the prevailing circumstances.

These circumstances may be summarized as follows:

Prior to Ginzburg's conviction, the critical question in prosecutions under the federal obscenity statute centered

on the published material itself—*was* it obscene *per se*?[3] *Manual Enterprise Inc. v. Day,* 370 U. S. 478, 489, 82 S. Ct. 1432, 8 L. Ed. 2d 639 (1962); *Roth v. United States,* 354 U. S. 476, 488-489, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).

In its Opinion in the instant case, the Supreme Court added a new ingredient to its previously declared "*obscene per se*" testing formula—an ingredient which, acting as a catalyst, transforms published material which standing alone is not obscene *per se,* into obscene matter. That ingredient is "pandering"—exploiting a publication, via promotional advertising or literature which represents it "as erotically arousing", and places "sole emphasis * * * on the sexually provocative aspects" of the publication.

The Supreme Court epitomized this ingredient in its Opinion as follows (383 U. S. pp. 475-476, 86 S. Ct. p. 950):

> "Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation".

It must be noted on the score of the stated obscenity-testing formula that the Supreme Court expressed the view that it was merely an *elaboration* of the prior "obscenity *per se*" test.

It did so in this prefacing statement (p. 475, 86 S. Ct. p. 950):

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3. In *Roth v. United States,* 354 U. S. 476 (1957) the Court (p. 487, 77 S. Ct. 1304, p. 1310, 1 L. Ed. 2d 1498) said: "Obscene material is material which deals with sex in a manner appealing to prurient interest", and (p. 489, 77 S. Ct. p. 1311) stated that the test is "whether to the average person, applying contemporary community standards, *the dominant theme of the material taken as a whole appeals to prurient interest*". (Emphasis supplied.)

"It is important to stress that this analysis simply *elaborates* the test by which the obscenity vel non of the material must be judged". (Emphasis supplied.)

The circumstance that Ginzburg's conviction was affirmed by application of an *elaborated* legal standard or test which had not been announced by the Supreme Court of the United States at the time of his condemned conduct, or trial, is relevant to the issue of the District Court's denial of his application for a hearing on his petition for reconsideration of sentence in these respects:

Ginzburg did not know, nor could he have known, that at the time he published and exploited Handbook, Eros and Liaison, that the criteria of obscenity included "pandering", and methods of promotional exploitation of a publication proscribed by the *elaborated* obscenity testing formula. Otherwise stated, assuming that Ginzburg personally participated in the condemned activity, he did not know, nor did he have reason to know, that he was violating the obscenity statute. The stated factor merited its presentation to the District Court at a hearing on Ginzburg's petition for reconsideration.

Ginzburg's application to adduce testimony at the sought hearing that he did not take part in the attempts to obtain mailing privileges at Intercourse, Pennsylvania, and Blue Ball, Pennsylvania, or in the obtaining of such privileges at Middlesex, New Jersey, and that he had not adduced such testimony at his trial because his then counsel did not consider the applications to the post offices to be material under the then state of the law, merited hearing and consideration in connection with the sentence reconsideration petition.

Ginzburg's application to present testimony as to his character and prior good conduct record as a law-abiding citizen; the family hardship impacts of his sentence; his commitment to cease the publication of material of the kind

which led to his conviction; and his commitment to lead a life free of any criminal conduct, presents considerations significant to the sentencing process, especially when viewed against the background of his 5-year prison sentence. For some inexplicable reason, Ginzburg's trial counsel did not see fit to advise submission of the now proffered testimony prior to the imposition of his sentence, thereby depriving both Ginzburg and the sentencing judge of the consideration of factors which have traditionally been deemed to be critical guide-lines in the sentencing process, and as to which the concept of waiver should not apply. We can come to no other conclusion than that the District Court should have granted Ginzburg's request for a hearing at which he could adduce the aforestated proffered testimony.

For the reasons stated we are of the opinion that the District Court abused its discretion in failing to accord Ginzburg's requested hearing on his petition for reconsideration of sentence in the light of the considerations earlier detailed.

Further, we feel compelled to express our view, that should Ginzburg's testimony at a hearing on his petition establish that he did not participate in the aura producing techniques condemned by the Supreme Court, viz., the mail privilege solicitations at Intercourse, Pennsylvania, Blue Ball, Pennsylvania, and Middlesex, New Jersey, and the good character and hardship aspects of his petition, that it would warrant a significant change by the District Court in the nature and character of its present sentence.

The cause will be remanded to the District Court with directions to grant a hearing on Ginzburg's petition for reconsideration of sentence and to proceed in accordance with this opinion.

Chief Judge HASTIE joins in this opinion and also agrees that the concurring opinions state adequate reasons for vacating the appellant's sentence.

SEITZ, Circuit Judge (concurring).

I concur in the conclusion that this matter should be remanded to the district court. But to avoid any possibility of impinging on the Supreme Court's mandate here, I prefer to ground my vote on reasons that are not dependent upon the soundness of our interpretation of the Supreme Court opinion in this case. However, while not condoning Ginzburg's activities, I think it is appropriate to note how finely the line may be drawn between freedom and imprisonment, even among commercial operators in this field. Compare *Redrup v. State of New York,* 386 U. S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (1967).

In his timely petition for reconsideration of sentence under F. R. Cr. P. 35, Ginzburg prayed for an evidentiary hearing. The district judge heard counsel and, without delineating his reasons, entered an order denying the prayers of the petition. This appeal followed.

I believe the refusal to grant Ginzburg an evidentiary hearing on his petition was incompatible with a sound exercise of discretion. I base my conclusion on at least the cumulative effect of the factors of record which I shall discuss.

1. At the time of the original sentencing Ginzburg's counsel made no statement on his behalf and when the court asked the defendant himself if he wished to "address" the court, defendant said that his counsel had "expressed my messages." I need not decide whether Ginzburg was afforded a sufficient opportunity to make a statement and presentation under Rule 32(a) when he was invited to "address" the court. The court did have a presentence report but its contents were not disclosed. The petition for reconsideration recites that Ginzburg did not take advantage of his original opportunity because he was relying on the advice of his counsel, who presumably felt that a

reversal of the conviction was a certainty. It was not of decisive importance that Ginzburg did not take advantage of the opportunity to speak, for whatever reason. What was important was that at the reconsideration stage he wanted to do so and was denied that privilege. Had he been permitted to speak he might have supplied the trial judge with material which would have been helpful to the judge in deciding the merits of the petition. It is not a matter of waiver in this context. Rather, it is the desirability of the sentencing judge being as fully informed as possible before deciding an application for reconsideration.

2. There was a lapse of over two and one-half years between the date of the original sentencing and the proceedings on the present petition. Insofar as the petition showed, the refusal to grant the hearing precluded the development of certain relevant matters which arose after the original sentencing. One of the reasons for Rule 35 would seem to be to permit the updating of a sentenced defendant's personal history in aid of an informed reconsideration.

3. At the argument on this petition the district court, referring to his sentencing notes, stated that Ginzburg had been convicted on 28 counts. It then indicated that it could have sentenced him to 140 years. The court then asked counsel: "Now, then, do you want to compare 5 to 140?" I believe that the district court was not legally warranted in assuming that it could have imposed prison sentences aggregating 140 years. I think the allowable units of prosecution were six at most (one for each of the three publications and one for the advertising in connection with each). See *Ladner v. United States*, 358 U. S. 169, 79 S. Ct. 209, 3 L. Ed. 2d 199 (1958). It is true that this would still have permitted the district court to impose a substantially greater prison sentence than was in fact imposed. But that is not the point. The point is that when it fixed the five year

prison sentence the district court believed it was being lenient in relation to 140 years. The district court might well desire now to reconsider entirely the nature of the sentence in the light of a corrected understanding of the permissible maximum sentence.

4. In the Government's response to Ginzburg's petition, it was suggested that a hearing would be appropriate. Indeed, it stated further that the Government did not take a position insofar as the petition sought a reduction in sentence.

I believe the product of a full evidentiary hearing may well cause the district court to find merit in the petition. I am confident that it will evaluate the matter afresh and discharge its duty as the evidence and the law dictate.

In my view, the assignment of error based on the refusal of the sentencing judge to disclose the contents of the pre-sentence investigation need not now be considered. Rather, I believe the ruling thereon should be vacated so that it can be renewed before the district court, if deemed important, after the development of the facts at the evidentiary hearing. The court's exercise of discretion, if invoked, can then be made in the light of the developed facts.

Judge FREEDMAN concurs in this opinion.

GERALD MCLAUGHLIN, Circuit Judge (dissenting).

Appellant, with three corporate co-defendants, was convicted of violating the federal obscenity law, 18 U. S. C. § 1461. He was sentenced to five years imprisonment and to pay a fine. On appeal this Court affirmed the conviction, 338 F. 2d 12 (1964). Thereafter the United States Supreme Court affirmed, 383 U. S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31 (1966). Petition for rehearing was denied by the Supreme Court, 384 U. S. 934, 86 S. Ct. 1440, 16 L. Ed. 2d 536 (1966).

Appellant, then finally confronted with the immediacy of his prison sentence, filed a petition for reconsideration of sentence, etc. in the District Court. After extended oral argument, in which there are no signs of restriction, the petition was denied by the order of the District Court filed July 5, 1966. This appeal is from that order.

While appellant's argument is a desperate shotgun performance, his fundamental thesis is that the United States Supreme Court affirmed his conviction "under a new court test of obscenity * * *" of which he had no notice. Following through on this appellant's argument resolves itself into a more or less artful endeavor to relitigate the merits of his obscenity conviction. In connection with this he now asserts that he had nothing to do with the attempt to secure mailing privileges from Intercourse and Blue Ball. He also at this juncture says that he published the "three books" because he was "wrongly advised" by counsel. In addition and for the first time he asks for the pre-sentence report, claims the judge erred in sentencing him and states that this Court "must not only vacate but modify the sentence imposed on appellant below."

The "new court test" which appellant would have us believe was never argued in the District Court actually was there presented in detail. After the testimony had been concluded both sides argued orally to the Court. In the course of his elaborate main argument, the District Attorney said as to Ginzburg's actions and conduct, "The real purpose that comes out is the pandering and the commercializing upon man's taste for the sensuous, * * *." Referring to the concurring opinion of Chief Justice Warren in *Roth v. United States,* 354 U. S. 476, 495, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), the District Attorney commented, "* * * we get into an area that Chief Justice Warren in Roth indicated that he thinks is the most important area

when he said: 'A book is not on trial, a person is, and the focus should be on the defendant's conduct and the materials are thus placed in the context from which they draw color and purpose.'" After analyzing the three publications with that element in mind the District Attorney stated "So there appears in all three a consistent pattern of commercial exploitation and [in] purveying matter appealing to the prurient interest * * *."

The defense attorney, making his argument after the District Attorney had spoken as above noted, admitted "There is some question of intent here, * * *" but went on in an endeavor to ridicule the position of the Government saying, "* * * but immorality and heresy equals obscenity to the Government of the United States."

The trial Court both in its opinion and in its findings of fact held that the three publications were designed obviously and solely for the purpose of appealing to the prurient interest of an ordinary person. The Court summed up its factual findings saying:

> "In conclusion, after a thorough reading and review of all the indicated materials, this Court finds that said materials are compilations of sordid narrations dealing with sex, in each case in a manner designed to appeal to prurient interests. They are devoid of theme or ideas. Throughout the pages of each can be found constant repetition of patently offensive words used solely to convey debasing portrayals of natural and unnatural sexual experiences. Each in its own way is a blow to sense, not merely sensibility. They are all dirt for dirt's sake and dirt for money's sake."

On appeal from the convictions to this Court appellants in their main brief dealt with that phase of the case under their title "The trial court converted evidence of criminal intent admissible against one defendant into proof of crimi-

nal intent on the part of all defendants." They complained in their brief that "The trial court found that all the defendants sought to mail from Blue Ball, Pennsylvania, from Intercourse, Pennsylvania, and finally did mail from Middlesex, New Jersey 'in order that the postmark of [the] mailed material would further defendants' general scheme and purpose' ". Their affirmative argument was that the letters, if admissible, were admissible only as to Eros.

The Government developed the commercial exploitation of morbid sex at length in its answering brief. It cited *Kahm v. United States*, 300 F. 2d 78 (5 Cir. 1962) in support of this and again quoted Chief Justice Warren's language in his concurring opinion in Roth. Appellants' reply brief made a full effort to answer that Government argument.

Our opinion on the appeal, 338 F. 2d 12 (1964), covered the point factually and decisionally. Appellants' petition for certiorari sharply brought the specific problem to the United States Supreme Court in 6(a) and (b) of its "Questions Presented" which read as follows:

> "6(a). Where four defendants are jointly indicted and tried for non-related obscenity offenses and evidence of one defendant's alleged intent to appeal to prurient interest is used to support conviction of all defendants on the theory that they engaged in a 'general scheme and purpose' to commercially exploit obscenity, may the appellate court disregard the erroneous transfer of such intent and affirm all four convictions on the theory that each defendant knew the contents of the mailed material?
>
> "(b). Is the fact that a defendant commercially exploits a literary work for a profit a relevant consideration in determining whether that work is 'obscene' under 18 U. S. C. § 1461?"

The Supreme Court in passing upon those questions and holding that appellants' exploitation of the material involved was on the basis of its appeal to prurient interests, said:

> "It is important to stress that this analysis simply elaborates the test by which the obscenity vel non of the material must be judged. Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation," United States v. Ginzburg, et als., 383 U. S. 463, 475-476, 86 S. Ct. 942, 950, 16 L. Ed. 2d 31 (1966).

The Court inter alia cited with approval the mentioned concurring opinion of Chief Justice Warren and the very much in point Judge Learned Hand opinion in *United States v. Rebhuhn,* 109 F. 2d 512 (2 Cir. 1940).

It will be noted that the exploitation issue was set out by appellants as a trial fact in their petition for certiorari to the Supreme Court. And it is significant that the trial offers in evidence of the defendants' applications to the Post Offices at Blue Ball and Intercourse were not objected to on behalf of Ginzburg on the ground that he had had nothing to do with them. They were objected to as "in no way relevant to the particular issue or publication upon which the defendant had been indicted." Concerning the application to the Middlesex Post Office, the Postmaster of Middlesex testified that "On the 13th of August, Eros Books, Incorporated, 110 West 40th Street, New York * * * requested through a mail order house, a patron of Middlesex Post Office, an application to mail without affixed

postage." There was no objection to that testimony and it was from that Post Office that 6,067,573 pieces of all classes of mail were sent by Eros.

Appellants petitioned the Supreme Court for rehearing. In their petition they asserted at great length that the "sordid business of pandering was not in the case at all." The petition for rehearing was denied.

It is plain from the record that appellant's assertion that the Supreme Court affirmed his conviction on a new court test of obscenity of which he had no notice is entirely ill-founded in law and in fact.

The remaining contentions of appellant need but brief comment.

Ginzburg, the sole appellant in the issue before us, has now made an affidavit that he had no part in the applications to the United States Postmasters at Blue Ball and Intercourse. He does not deny knowledge of the Middlesex application which the Postmaster of that place had testified was made by Eros through a mailing house.

The trial proofs were that the applications to the Blue Ball and Intercourse Post Offices were made by the defendant Eros Corporation. The letters in evidence were signed for Eros by the associate publisher of that corporation. Ginzburg was the admitted publisher. The whole trial defense objection to the admission of the letters in evidence was on the ground they were irrelevant to the particular issue of the magazine involved. The sole objection to the first two applications on appeal was not that they did not show evidence of criminal intent but that such evidence should be directed only to Eros Corporation. The trial Court found on substantial evidence that all the defendants took part in those applications and in the successful one to Middlesex and that all three places were chosen in furtherance of defendants' general scheme and purpose. The fact

that in the circumstances surrounding the current affidavit of appellant, the Government does not challenge it, is of course no bar to the decision of the District Judge in assessing its credibility.[1] Irrespective of appellant in this petition denying participation in the mailings, there was compelling trial evidence of his responsibility for the said applications.

Appellant argues that he was entitled to the disclosure of the presentence report. He never requested that report until his petition on July 1, 1966. The named ground for the request was so that appellant could "offer evidence contrary to statements therein which may be incorrect." Under Fed. R. Crim. P. 32(c)(2) as amended, disclosure of said report is within the discretion of the judge and that discretion was not here abused.

Appellant also claims that the District Court acted upon an erroneous legal assumption when sentencing appellant. The contention is clearly made of whole cloth. There was no error of any substance arising out of the sentencing. The three year prison concurrent sentences were for all of the indictment counts for the mailing of the Housewife's Handbook on Selective Promiscuity. The two year concurrent sentences were for all the counts on the mailing of the Eros Magazine. The three year concurrent sentences were to run consecutively with the two year concurrent sentences which made five years as the total prison time to be served by appellant. The sentences were in strict accordance with the statute. They were never so objected

1. There was a query from this Court to counsel for appellant during oral argument regarding purported direct statements by appellant concerning the attempted mailing in a then current publicly circulated book (titled "Freedom on Trial") in defense of appellant with a foreword by the "Chairman, Commitee to Protest Absurd Censorship." *Counsel promptly filed affidavits by appellant and the book's author which in effect denied the truth of the book's said statements.*

to until this motion. The decisions cited for appellant are inapposite. After again reviewing the original trial of this case in depth I see no abuse of discretion by the District Court in the imposition of those sentences, *United States v. Frank*, 245 F. 2d 284, 288 (3 Cir. 1957), cert. den. 355 U. S. 819, 78 S. Ct. 25, 2 L. ed. 2d 35 (1957).

It is asserted on behalf of appellant that he was entitled to a hearing on the petition for reconsideration of his sentence. Prior to the original sentencing the Court asked both of appellant's attorneys if they wished to say anything. They both responded in the negative. The Court then stated, "The defendant may address the Court." The defendant answered "I think my attorney has expressed my messages, thank you." The Court queried him "You have nothing further to add?" The defendant said "No, sir, thank you." Beyond question there was no infringement of appellant's rights; to the contrary there was intentional relinquishing or abandonment of a known right or privilege by appellant and his attorneys.

Appellant relies on Rule 32(a) Fed. R. Crim. P. for a hearing at this time. That rule refers to the original sentencing and not to this motion for reconsideration. Rule 35 Fed. R. Crim. P. grants the Court authority to correct "an illegal sentence at any time * * *." That rule does not provide for a mandatory hearing. A hearing on the petition before us was within the discretion of the trial Court. Under all the facts it cannot be justly held that in denying such hearing the trial Court abused its discretion. *Del Piano v. United States*, 362 F. 2d 931 (3 Cir. 1966) has no bearing on our situation. In that decision there was a conviction following a plea of guilty. Later, the defendant in a 2255 proceeding swore that the guilty plea had been induced by a promise of a concurrent sentence with the one defendant was serving. On counter affidavits that was

denied. We held the defendant should have been given a hearing on his charge. Ginzburg had a full and fair trial. He and his attorneys waived a hearing as to the sentence. Now because he makes the totally unwarranted claim that the United States Supreme Court erroneously affirmed his conviction, he asks for another hearing under the guise of reconsideration of the sentence. The Court in its discretion refused that request. The refusal was reasonable, within the sound discretion of the trial Judge.

Turning to specific consideration of the majority opinion I note that it starts out by firmly holding that "Ginzburg did not know, nor could he have known, that at the time he published and exploited Handbook, Eros and Liaison, that the criteria of obscenity included 'pandering', and methods of promotional exploitation of a publication proscribed by the elaborated obscenity testing formula. Otherwise stated, assuming that Ginzburg personally participated in the condemned activity, he did not know, nor did he have reason to know, that he was violating the obscenity statute." Therefore, concludes the Court "The stated factor merited its presentation to the District Court at a hearing on Ginzburg's petition for reconsideration." The majority thus offhandedly accepted in its stride, the admitted truth that Ginzburg was a panderer and occupied in his profession in this instance. The Supreme Court in its decision here, quoting from the concurring opinion of the Chief Justice in Roth, describes pandering as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." 383 U. S. at 467, 86 S. Ct. at 945. Apparently it will be startling news that the defendants in Roth (1957), just as was this appellant, "* * * were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect." Chief Justice Warren went on to state "I believe

that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us and that is all we need to decide." *Roth v. United States,* 354 U. S. at 496, 77 S. Ct. at 1315 (1957). Roth in its four opinions was certainly well known to Ginzburg and to all his attorneys. Even the Roth dissent in trying to denigrate the majority view stressed the "pandering" element saying p. 500, 77 S. Ct. 1304, "The tests by which these convictions were obtained require only the arousing of sexual thoughts." 354 U. S. 509, 77 S. Ct. 1322. It is beyond belief that this professional panderer through the device of protesting under oath at this time that he did not know or have reason to know that his operation was other than in the clear by reason of the governing Roth decision, is entitled to the rehearing called for by the majority. The Supreme Court in this appeal said, 383 U. S. at 466, 86 S. Ct. at 945: "* * * as did the courts below, 224 F. Supp. at 134, 338 F. 2d at 14-15, we view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal." That is the way appellant planned and executed his evil scheme. In that posture the offense was and is a Roth offense. The trial judge was thoroughly conversant with this, so much so that the Supreme Court in its Ginzburg opinion p. 465, 86 S. Ct. p. 944 held that "*Since petitioners do not argue that the trial judge misconceived or failed to apply the standards we first enunciated in Roth v. United States,* 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498,[3] *the only serious question is whether those standards were correctly applied.*" (Footnote omitted.) (Emphasis supplied.)

Appellant in the Supreme Court had a go at bolstering his contention of unawareness of what he characterized as the Government's alleged trial position, i.e., that his methods of presentation and distribution were prime ele-

ments of his offenses. The Supreme Court in its opinion at p. 466, n. 6, 86 S. Ct. at p. 942 comments regarding this:

> "6. It is suggested in dissent that petitioners were unaware that the record being established could be used in support of such an approach, and that petitioners should be afforded the opportunity of a new trial. However, the trial transcript clearly reveals that at several points the Government announced its theory that made the mode of distribution relevant to the determination of obscenity, and the trial court admitted evidence, otherwise irrelevant, toward that end."

Obviously the statement that Ginzburg did not know and had no reason to know that his pandering use of his materials was not within the obscenity statute, viz., the controlling Roth law, is ill advised. The statement has no justification; it is a sorry ground on which to grant a rehearing in this appeal.

The second reason offered by the majority in advocating a rehearing is that Ginzburg's current statement that he had no part of the mailing attempts and that the only reason he did not so testify was that his attorney "did not consider the applications to the post offices to be material under the then state of the law, merited hearing and consideration in connection with the sentence reconsideration petition." This would seem to be an unsuspecting endeavor to allow Ginzburg to testify falsely, contrary to the unimpeachable record. I have earlier outlined the facts of this phase of the trial in disposing of appellant's argument thereon. Those facts could not be distorted by any glib, disingenuous story to the contrary; particularly by appellant on this issue as he does with others, trying to foist the responsibility for his trial maneuvers onto his attorneys who, as appears, were specially recommended to him by the

American Civil Liberties Union which organization has filed a brief with this Court on behalf of appellant. What appellant hopes will be in some fashion overlooked and which is not even mentioned by the majority or concurring opinions is that appellant for himself and his co-defendants entered into an elaborate formal stipulation prior to trial wherein he, over his signature, for himself and his co-defendants stated that in all counts of the bill of indictment involving the three publications "* * * *the defendants did knowingly mail or causes to be mailed the materials set forth in those counts on the dates set forth, fully knowing the contents of said materials.*" (Emphasis supplied.)

In the light of all of the above there is no validity to this point. To say the least it is legally frivolous.

The remaining reasons for allowing a rehearing regarding the sentence in this matter are said by the majority to be that Ginzburg should be given an opportunity to tell about his character, his good conduct record as a law abiding citizen, and family matters. Both he and his lawyers directly refused that opportunity, fairly and unmistakenly offered by the trial Judge. His actions and conduct since can be seen crystal clear if one will look. The family conditions, whatever they may have been, were in existence both while Ginzburg was pursuing his carefully plotted course with his pandering project and during his trial. Despite that he and his attorneys affirmatively refused to tell the Court anything about them. The majority concludes that if it is established that Ginzburg did not participate in the mail privilege episodes, that his character was and is good and that he has family problems, there should be a significant change in the sentence. If the record is conscientiously examined it will reveal what is above shown, that Ginzburg beyond all doubt participated in the mailing endeavors, that the evil business he chose and followed,

thoroughly establishes his character. His family has lived with the public knowledge of appellant's occupation for some years now. A flagrant exhibition in the District Court as contemplated, contrary to the established truth of the basic elements of appellant's conviction and sentence, is not indicated in this case.

The concurring opinion is also in favor of Ginzburg speaking at this time, on the named theory that he might supply the judge with *material helpful* in deciding the merits of the motion. All this has been gone into above and needs no repetition. The other suggestion is that trial judge was confused regarding the sentence he imposed. That also has been fully dealt with earlier in this opinion. This Court in its unanimous opinion on the merits of the cause, passing upon the action of the trial judge re the mailing issue held "We do not find the slightest evidence of any substantial confusion on the part of the trial judge * * *." That holding is just as applicable to the inconsequential and baseless charge regarding the sentence imposed.

There is a vital point carefully avoided in the majority and concurring opinions with their assertions of abuse of discretion by the trial judge. Actually, to those with a real knowledge of the record in this appeal, the bright, shining light in all this dreary litigation through its Circuit Court stages has been the patient, wise, courageous functioning of Judge Body in the trial court.

From the unavoidable facts and despite such protective gloss as they have the majority and concurring opinions must be held to follow the current hard obscenity line which has this nation so saturated with obscenity and its collaterals that the resultant conditions make Sodom and Gomorrah seem to have been somewhat old fashioned, perhaps prudish communities. The continuing all out effort to salvage appellant from the proper punishment for his

shameless crime fits perfectly into the moral breakdown with which the United States of America is faced. Earlier this month among the strong sane voices refusing to bow to such destructive effort was that of Dr. Milton S. Eisenhower who warned that "licentiousness and persistent violence" could result in anarchy and, ultimately, dictatorship.

To remand this appeal with respect to the sentence, for the reasons advanced is grossly unwarranted.

Judge STALEY concurs in this dissent.

VAN DUSEN, Circuit Judge (dissenting).

I dissent for the reasons stated in Judge MCLAUGHLIN's thorough and accurate examination of the prior decisions in this litigation and of the extensive record, and particularly in his legal analysis and discussion which also appeared in his opinion filed March 13, 1967, prior to this court's granting rehearing. Also, I agree that Judge Body has acted carefully and properly in his handling of this protracted criminal proceeding. The fact that the sentencing judge mentioned in an "offhand remark" a possibly excessive sentence does not justify review of a sentence concededly well within the limits of the applicable statutes. Cf. *United States v. DeAngelis,* 361 F. 2d 788, 790 (3rd Cir.), cert. den. 385 U. S. 834, 87 S. Ct. 77, 17 L. Ed. 2d 69 (1966). Congress and this court have repeatedly recognized that review of sentences by the Federal appellate courts is not permitted under these circumstances. See e.g., S. 2722, 89th Con., S. 823, 88th Cong., S. 1692, 87th Cong., and S. 3914, 86th Cong., H. R. 270, 85th Cong.;[1] *Gore v. United States,* 357 U. S. 386, 393, 78 S. Ct. 1280, 2 L. Ed. 2d 1405 (1958); *United States v. Frank,* 245 F. 2d 284, 288

1. None of the above Bills providing for appellate review of federal sentences was enacted by Congress; see, also, "Appellate Review of Sentences," 32 F. R. D. 249 (1962).

(3rd Cir.), cert. den. 355 U. S. 819, 78 S. Ct. 25, 2 L. Ed. 2d 35 (1957). Appellant was not precluded from including any relevant matters in his Petition for Reconsideration and, since the factual contents of that Petition were treated as true at the 1966 argument, no need existed for a hearing.

I believe the order of the District Court should be affirmed.

Judge STALEY concurs in this dissenting opinion.

SENTENCING.

[7]

The Court: Mr. Sutton.

Mr. Sutton: We have no comment, if Your Honor please. Thank you.

The Court: Does the defendant care to speak to the Court, make a statement in his own behalf? Mr. Ginzburg.

The Defendant: No, thank you, Your Honor. I appreciate the fact that you let me testify at length, and I have no elaboration on those statemetns.

The Court: Well, you are entitled at this time to make a statement to the Court. We give you that opportunity, sir.

The Defendant: I appreciate that very much, sir. I will rely on the statements of my attorney.

The Court: Very well.

The Defendant: Thank you.

The Court: After full hearing and argument and considerable meditation, it is ordered that (1) as to Counts 11 to 16, inclusive, the defendant's petition or motion to vacate, suspend or reduce the prison sentence is denied. However, the sentence is modified in that it is directed that the defendant shall, as to each count, be placed in the custody of the Attorney General of the United

[8]

States or his duly authorized representative for a period of three years and pursuant to the provisions of Title 18, U. S. C. A., Section 4208(a)(2), which provides that the Court may fix the maximum sentence of imprisonment to be served, in which event the Court may specify, and we do so specify, that the prisoner may become eligible for

parole at such time as the Board of Parole may determine. The sentences thus imposed on Counts 11 to 16, inclusive, shall run concurrently.

(2) That as to Counts 17 to 22, inclusive, the defendant's petition or motion to vacate the prison sentence is granted, and as to each count the defendant is placed on probation for a period of two years; said two-year period shall commence upon the defendant's release from custody, and as to each of said Counts 17 to 22, inclusive, they shall run concurrently.

In all other respects, the sentences imposed by the trial shall shall remain unchanged.

Mr. Kohn: Would Your Honor please continue the bail? I think we want to give serious attention to the propriety of an appeal.

The Court: Certainly.

Mr. Kohn: And we will decide promptly what to do.

* * *

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,090

UNITED STATES OF AMERICA

v.

RALPH GINZBURG,
DOCUMENTARY BOOKS, INC.,
EROS MAGAZINE, INC.,
LIAISON NEWS LETTER, INC.,

RALPH GINZBURG, *Appellant*

(D. C. Criminal No. 21367)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 28, 1971
Before FORMAN, ALDISERT and GIBBONS,
Circuit Judges

OPINION OF THE COURT.

(Filed February 2, 1971)

PER CURIAM:

We have carefully considered the arguments of the Appellant and have concluded that the sentencing judge committed no error.

The judgment imposing sentence will be affirmed and the mandate will issue forthwith.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,090

UNITED STATES OF AMERICA

v.

RALPH GINZBURG;
DOCUMENTARY BOOKS, INC.;
EROS MAGAZINE, INC.;
LIAISON NEWS LETTER, INC.

RALPH GINZBURG, *Appellant*

Present: HASTIE, *Chief Judge,* and FORMAN, FREEDMAN,* SEITZ, VAN DUSEN, ALDISERT, ADAMS, GIBBONS and ROSENN, *Circuit Judges.*

OPINION OF THE COURT ON PETITION FOR REHEARING.

(Filed March 30, 1971)

PER CURIAM:

The full court has considered the petition for rehearing and a majority have concluded that the prayer of the petition be denied. Judge Freedman had prepared a proposed dissenting opinion. He died before this opinion was filed. We include the proposed dissenting opinion as an appendix.

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* Judge Freedman participated in the consideration and disposition of the petition for rehearing, but died before this opinion was filed.

APPENDIX.

UNITED STATES v. GINZBURG et al.—No. 19,090

FREEDMAN, *Circuit Judge,* dissenting.

I feel strongly that this appeal should be reheard by the court en banc.

Ginzburg was convicted and sentenced on 28 counts charging violations of the federal obscenity statute (18 U. S. C. § 1461). The resentencing now before us retained all of the sentences previously imposed upon him,[1] except for counts 11 to 16 and counts 17 to 22, the sentences imposing imprisonment. As to each of counts 11 to 16 he was resentenced to a three-year period of imprisonment with the specification under the provisions of 18 U. S. C. § 4208(a)(2) that this was a maximum sentence and that he would be eligible for parole at such time as the Board of Parole would determine. The sentences on each of these counts were made to run concurrently. As to each of

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1. The counts and the original sentences thereon are as follows:

Counts		
1-3	mailing circular on Housewife's Handbook to named individual	—fine $1,000 on each count
4-6	mailing circular on Liaison to named individual	—fine $1,000 on each count
7-10	mailing circular on Eros to named individual	—fine $1,000 on each count
11-16	mailing Housewife's Handbook to named individual	—3 years & $1,000 fine on each count (prison sentences concurrent)
17-22	mailing Eros to named individual	—2 years & $1,000 fine on each count (prison sentences concurrent but after 3 years above)
23-28	mailing Liaison to named individual	—$1,000 fine on each count

counts 17 to 22 he was placed on probation for a period of two years, to commence on his release from custody, each of the sentences on these counts to run concurrently.

When the case was last before us on appeal from the denial of the petition for reconsideration of the original sentence, we remanded with directions to grant a hearing on Ginzburg's petition.[2] The concurring opinion of Judge Seitz, in which I joined and to which Judge Hastie indicated his agreement, stated that "the allowable units of prosecution [under all the counts] were six at most. . . ." We based this on the view that there could be only "one [sentence] for each of the three publications and one for the advertising in connection with each . . .", citing Ladner v. United States, 358 U. S. 169 (1958).

The concurring opinion declared that the sentences should be reconsidered because the sentencing judge had erroneously thought he could have imposed sentences of imprisonment aggregating 140 years based on the five-year statutory maximum sentence multiplied by each of the 28 counts. The concurring opinion also pointed out that this error was not cured because the five-year sentence was within the allowable maxmium on any one count. This is because it was obvious that the sentencing judge acted in the mistaken belief that he was being lenient, as indeed would have been the case if his assumption were correct that he could have imposed sentences on each of the 28 counts.

Under the view expressed in the concurring opinion there could be only one sentence on counts 11 to 16 and only one sentence on counts 17 to 22. But now sentences have been imposed on all 12 of these counts. As in the original sentences, they do not exceed the allowable maximum of five years imprisonment. The error, however, is

2. United States v. Ginzburg, 398 F. 2d 52 (3 Cir. 1968).

that the resentencing judge too was influenced by the fact that he thought sentences could have been imposed for five years on each of the 12 counts, for a total of 60 years imprisonment.

It is true that the judge ordinarily would be limited in resentencing to the maximum sentence originally imposed.[3] This, however, does not alter the effect on the resentencing judge's mind of the seeming severity of the wrongs committed if he believed that but for the leniency of the original sentence he would have had the power to impose sentences on these 12 counts totaling 60 years.

In reimposing fines on all 28 counts the resentencing judge repeated the original imposition of fines of $1,000 on each count for a total fine of $28,000. Assuming that the resentencing judge was limited to imposition of a fine on each count which would be no greater in amount than was originally imposed on each count, under the view expressed in the concurring opinion there were at most six allowable units of prosecution on which the fines could have been imposed, or a maximum fine of $6,000.

The resentencing, therefore, contains the same basic error which pervaded the original sentencing. At the very least I believe there is sufficient doubt of the validity of the resentencing both as to the fines and as to the imprisonment, even though the imprisonment has been ameliorated to some extent, that the case should be reheard before the court en banc.

I therefore dissent from the denial of the petition for rehearing by the court en banc.

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3. Cf. North Carolina v. Pearce, 395 U. S. 711 (1969).

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL No. 21367

UNITED STATES OF AMERICA

v.

RALPH GINZBURG,
DOCUMENTARY BOOKS, INC.,
EROS MAGAZINE,
LIAISON NEWS LETTER, INC.

ORDER STAYING JUDGMENT.

AND Now, this 19th day of March, 1971, it is hereby ORDERED as follows:

The judgment of this Court filed June 2, 1970, affirmed by the Court of Appeals on February 2, 1971, and heretofore stayed on February 3, 1971, is hereby further stayed pending adjudication by the Court of Appeals of the Petition for Rehearing filed February 11, 1971, and in the event that such Petition be denied, or after being granted the judgment is affirmed, is further stayed pending Appellant's filing of a petition for a writ of certiorari in the Supreme Court of the United States and the grant or denial thereof by that Court, provided said petition is filed within 45 days from the date of this order.

E. MAC TROUTMAN,
U. S. D. J.

FEDERAL OBSCENITY STATUTE. 18 U. S. C. § 1461.

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this

section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination. June 25, 1948, c. 645, 62 Stat. 768; June 28, 1955, c. 190, §§ 1, 2, 69 Stat. 183; Aug. 28, 1958, Pub. L. 85-796, § 1, 72 Stat. 962.